Supreme Court, U.S.
FILED

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No. ____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term 1996

LEAMINDA COKER,

Petitioner,

v.

JAMES P. DOUGLAS, A.A. COOK, RAY WILLIAMS, GEORGE E. SUMROW, CLIFFORD HENDERSON, CHARLES MELTON, Individually and as Trustees of the IBEW PENSION TRUST FUND LOCAL 716, and IBEW PENSION TRUST FUND LOCAL 716, and the INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 716,

Respondents.

Petition For Writ Of Certiorari
To The Court Of Appeals
For The Fourth Judicial District
Bexar County, Texas; Cause No. 04-9500204-CV

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

29 U.S.C. § 1132 (of ERISA) specifies persons empowered to bring a civil action under ERISA; § 1144 (ERISA's preemption clause) provides for preemption of state laws which relate to an ERISA Plan. The state court granted summary judgment dismissing Petitioner's case, which asserts only state law claims, on the grounds of complete ERISA preemption. Petitioner lacks standing to sue under § 1132 to enforce her claims under ERISA. The questions presented are:

1. Whether standing to enforce ERISA is a prerequisite to ERISA preemption.

2. If so, whether the state court's dismissal of petitioner's case violates petitioner's Fourteenth Amendment constitutional guarantee of due process of law and access to the courts.

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PETITION FOR WRIT OF CERTIORARI

Leaminda Coker respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals For The Fourth Supreme Judicial District of Texas in this case.[1]

OPINION BELOW

The judgment and opinion of the Fourth Court of Appeals (App. 1a-11a) is unpublished. The Order and Judgment of the state district court (App. 14a-17a) is not reported.

JURISDICTION

The Texas state district court entered its final judgment dismissing petitioner's case on October 31, 1994. App. 17a. The state court of appeals entered its judgment affirming such dismissal on February 28, 1996. App. 2a. Petitioner's Motion for Rehearing in the state court of appeals was denied on April 2, 1996. App. 19a. The Texas Supreme Court issued its Order denying review of petitioner's case on October 18, 1996. App. 12a. This petition is being filed within 90 days of the October 18, 1996 Order of the Texas Supreme Court denying review. The

[1] On October 18, 1996, the Texas Supreme Court, without opinion, denied Petitioner's Application for a review of the decision.

jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Constitutional Provisions

U.S. Const. Amend. XIV (Fourteenth Amendment – Due Process Clause), reproduced in its entirety at App. 40a-41a, provides in pertinent part:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutory Provision

Title 29 U.S.C. § 1132 ("ERISA"), reproduced in its entirety at App. 42a-51a, provides in pertinent part:

> (a) **Persons empowered to bring a civil action**
>
> A civil action may be brought –
>
> (1) by a participant or beneficiary –
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of the plan, to enforce his rights under the terms

of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (I) or (1) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title); or

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title,

(A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection.

Title 29 U.S.C. § 1144 ("ERISA"), reproduced in its entirety at App. 52a-56a, provides in pertinent part:

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provision of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

STATEMENT

This case involves the issues of whether standing to enforce ERISA is a prerequisite to ERISA preemption, and if so, whether the state court committed reversible constitutional error in dismissing Petitioner's case where Petitioner lacks standing to enforce her claims under ERISA.

Petitioner "Coker" filed suit in state district court against her employer, an ERISA Plan, and her supervisors, the Plan trustees, alleging claims under state law

for wrongful discharge, breach of her employment contract, and conspiracy to wrongfully terminate her employment.[2] Coker also sued the Union for tortuous interference with her employment contract and asserted a claim against all defendants for intentional infliction of emotional distress.

Coker's claim of wrongful discharge is based on Texas common law pronounced in the Texas Supreme Court's decision in *Sabine Pilot Services, Inc. v. Hauck*, 687 S.W.2d 773 (Tex. 1985), which creates a public policy exception to Texas' employment-at-will doctrine by prohibiting an employer from discharging an employee for refusing to commit an illegal act, [i.e., an act violating a criminal law]. To support her wrongful discharge claim under *Sabine*, Coker alleged that she was fired for refusing to participate in conduct which was either illegal and/or because she investigated whether such conduct was legal.

The conduct involved the processing of unemployment loan applications for unemployment loans authorized by the Plan. The court of appeals concluded that an interpretation of the Plan was required to determine the validity of the unemployment loans made by the Plan trustees and therefore Coker's claims were preempted by ERISA. Coker argued that the unemployment loan process presented issues merely collateral to her wrongful discharge claim under *Sabine*. Coker complained that the trustees' conduct *in terminating her employment*, violated

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[2] The opinion of the state court of appeals erroneously states [Coker claimed] that the trustees, her supervisors, "Conspired in approving [certain] loans" to plan participants. App. 5a.

Texas common law. Coker did not assert any breach of fiduciary duty claims against the trustees with respect to the loans. Moreover, the conduct of the trustees in firing Coker was not carried out as Plan fiduciaires but as Coker's employer.

Coker argued that she had no standing to enforce the claims under 29 U.S.C. § 1132, and sought no relief provided in § 1132. App. 23a. Coker does not meet any of the criteria required to bring a civil action under § 1132(a).

The court of appeals did not address Coker's arguments that she had no ERISA cause of action, (App. 25a), and that dismissal of her case by the state court violated her constitutional rights of due process of law and access to the court under both the state and federal constitutions. App. 25a-27a.

The opinion of the state court of appeals affirms dismissal of Coker's case on the grounds that her claims *relate to* an ERISA plan, thereby triggering ERISA's preemption clause under 29 U.S.C. § 1144.

A. Facts

At the time of her discharge in April of 1989, Coker was employed by an ERISA Plan; her formal job title specified in the trust instrument was Administrative Agent [to the trustees]. App. 65a.[3] Coker had been an office employee of the Plan for over seven years and had

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[3] The Plan was created pursuant to a Taft-Hartley Trust under 29 U.S.C. § 186(c)(5) and was required to be administered jointly by management and Union trustees.

received several promotions. She alleged that in approximately 1988 she was the office manager of the Plan office and was given the job title of Administrator by the trustees. Petitioner alleged that she continued to perform her duties as the office manager of the Plan office until she was discharged by the trustees. (Rec. Vol. IV, pp. 913-915).

Coker's job duties are described in an excerpt from the Trust instrument. (Rec. Vol. I, p. 302). App. 65a. None of the duties listed empowered Coker with any discretionary authority over the Plan's assets or administration. The Trust instrument specifies that the *trustees shall administer* the Plan and *shall instruct* the Administrative Agent *on all disbursements of plan benefits*. (Rec. Vol. I, p. 302).

Coker's breach of contract claim was based on a written contract of employment which, among other things, provides that Coker could be terminated only for just cause. (Rec. Vol. I, pp. 88-193).

Defendant/trustee George Sumrow stated in answer to sworn interrogatories filed early in the litigation that Coker was terminated because of her poor performance as "office manager". (Rec. Vol. I, p. 85).

Coker's job duties included processing paperwork associated with loan applications submitted by Plan participants to obtain unemployment loans authorized by the plan. A Notice of changes to the pension plan was distributed to plan participants. (Rec. Vol. I, pp. 140; 951). The Notice contains new language added to the Plan by amendment which authorized the trustees to make unemployment loans to plan participants. The Notice, sent to

the plan participants, states in part that "The Trustees may approve an unemployment hardship loan to unemployed participants and all such loans shall be subject to approval by the Trustees." (Rec. Vol. I, pp. 140, 951). The Notice further states that a participant must furnish two documents with an unemployment loan application: (1) a verification from the Union that the applicant "has been unemployed for at least thirty days . . . ", and (2) a verification from the Texas Employment Commission that the applicant "had applied for and was eligible for" unemployment benefits. As stated on the face of the Notice, these two verifications were required *to apply* for a loan. (Rec. Vol. I, pp. 140, 951). The loan applications and the accompanying documents were collected by the Plan's office staff, including Coker, and submitted to the trustees who had sole authority to approve the loan application.

Shortly before she was terminated, Coker refused to accept an application for an unemployment loan submitted by a participant/union member who admitted to Coker that he was not unemployed. (Tr. Vol. I, pp. 28-29). The member became irate and Coker reported the incident to the Union's business agent. Later that day, the Union member met with the Union's business agent and then returned to the Plan's office with his loan application, and a sworn verification from the Union that he was unemployed. (Rec. Vol. I, p. 29). Coker knew the Union had falsely verified that the member was unemployed.

After the incident, Coker investigated the files and discovered that many union members/plan participants had obtained unemployment loans without furnishing

the required verifications and/or by filing false verifications from the Union (that the member was unemployed). (Rec. Vol. I, pp. 28-29). Coker reported this information to the Union's business agent and to George Sumrow, a trustee, as well as the Union's attorney. She also requested that she be instructed on whether she should accept loan applications submitted by union members who were not unemployed and/or who did not furnish the documents specified in the Notice, or who furnished false verifications, from the Union. (Rec. Vol. I, pp. 28-31). None of the trustees or the attorney for the Plan instructed Coker on the matter as she requested. Coker believed it was illegal for her to accept false sworn verifications in support of loan applications. Coker did not claim that the Plan did not authorize the trustees to make unemployment loans, rather she objected to accepting loan applications based on false verifications of unemployment and/or not accompanied by the two documents specified in the Notice.

Defendants offered no evidence that Coker had any discretionary authority with respect to the assets or administration of the Plan; moreover, the record contains support to the contrary. The record contains no evidence that Coker had any discretion to act independently of the trustee's instructions in matters relating to the Plan's assets and administration. *See* (Rec. Vol. I, pp. 29, 302); (Rec. Vol. IV, p. 947 [a letter to Coker from the Board of Trustees advising Coker that the Administrator was an employee-at-will of the Plan]); (Appellant's Brief at p. 13, note 7); (Supp. Rec. 31 – Coker testified at deposition that after she was given the title of "Administrator", her job duties remained the same); (Supp. Rec. 45-47 – Coker

testified in deposition that the administrator [position] was [the same as] that of office manager).

Coker argued in the court of appeals that defendants had produced no summary judgment evidence to support their affirmative defense of ERISA preemption of Coker's case and challenged Respondents' characterization of her as an [ERISA] administrator. (Appellant's Reply Brief. at p. 8). (Supp. Rec., p. 38 – Coker's deposition testimony that she could not do anything [with respect to administration of the Plan] without the approval [instruction] of the trustees). Respondents did not produce, and the record does not contain any evidence to establish that Coker's position or duties fall under 29 U.S.C. § 1002(16)(A) (ERISA definition of administrator) or 29 U.S.C. § 1002(21)(A) (ERISA fiduciary).

Coker instructed another employee in the office not to accept unemployment loan applications. (Rec. Vol. I, p. 30). The office employee Coker instructed was a long-time friend of a Union agent who was also a trustee of the Plan. When this employee disregarded Coker's instructions, Coker complained to the trustees and recommended that the employee be terminated. The trustees immediately discharged Coker instead. (Rec. Vol. IV, p. 924).

Coker sought recovery of a money judgment against Respondents, including claims for monetary damages for lost wages, interest, mental distress and for punitive damages; she also sought recovery of attorney's fees in connection with her breach of contract claims. Coker sought no equitable relief under ERISA.

B. Proceedings Below

Coker filed suit in state court on April 3, 1990; her complaint alleges claims under state law for wrongful discharge, breach of contract, tortuous interference by the Union with her employment contract, conspiracy and intentional infliction of emotional distress. (Rec. Vol. IV, pp. 910-952). Respondents asserted the affirmative defense of ERISA preemption and early in the litigation filed a Plea to the Jurisdiction [of the state court], or Alternatively for Summary Judgment. (Rec. Vol. I, pp. 46-49). The Plea was denied by the state court. (Rec. Vol. I, p. 13). Respondents later removed the case to federal district court on the grounds of federal question jurisdiction. Coker filed a Motion to Remand her case to state court. In response, Respondents claimed that the federal statute which Coker furnished to support her claim under *Sabine* was evidence that Coker's claims were preempted by ERISA thereby invoking federal question jurisdiction. App. 60a-64a. The federal district court granted Petitioner's Motion to Remand and entered a Remand Order stating in part that Coker's case did not arise under federal law and Coker's "claim as a whole . . . is in essence one under state law." App. 58a.

Following remand, defendants again moved for summary judgment in the state district court on the grounds of ERISA preemption. The state court entered an interlocutory Order dismissing Coker's case against her employer the Plan, and the individual trustees based upon ERISA preemption, App. 14a-15a. The Union then sought to be included in the judgment of dismissal and the state court entered a Final Judgment dismissing

Coker's case against all defendants based upon ERISA preemption. App. 16a-17a.

Coker appealed from the state court judgment. The state court of appeals affirmed the trial court's dismissal of Coker's case and held that "because the inquiry must necessarily be directed to the underlying ERISA plan and its rules and regulations, plaintiff's state causes of action . . . " relate to the ERISA benefit plan and are preempted by ERISA. App. 11a. The court of appeals did not address Coker's arguments that she had no ERISA cause of action or standing to enforce her claims under ERISA. The opinion of the court of appeals states that ERISA preemption was not raised in the removal proceeding however, a copy of Respondents' opposition to Coker's Motion for Remand in which Respondents argued ERISA preemption was before the court of appeals. (Appellant's Reply Brief, Appendix 2); (Appellant's Reply Brief, pp. 8-14 – where Coker argues that the federal court's Remand Order impliedly rejected Respondents' ERISA preemption argument). The court of appeals denied Coker's Motion for Rehearing, App. 18a-19a.

Coker sought review of the opinion of the court of appeals in the Texas Supreme Court, claiming that she had no ERISA cause of action, [*i.e.*, no standing to enforce her claims under ERISA in federal court], and that the effect of the lower court decisions violated her state and federal constitutional guarantees of due process and access to the courts. App. 32a-37a. The Texas Supreme Court declined to review Coker's case. App. 12a-13a.

REASONS FOR GRANTING THE PETITION

I. The Petition Presents Important Questions of Federal Civil and Constitutional Law

This case presents the important question of whether standing to sue under ERISA is a prerequisite to both subject matter jurisdiction and ERISA preemption. The case thus also raises the important question of whether the state court's dismissal of petitioner's case, founded solely in state law, on the grounds of complete ERISA preemption violated petitioner's constitutional guarantee of due process and access to the courts where petitioner lacks standing [under ERISA] to enforce such claims in federal court.

The list of plaintiffs with standing to sue under ERISA's enforcement provisions set forth in 29 U.S.C. § 1132 [ERISA] is exclusive. See, *e.g., Pressroom Unions-Printers League Income Sec. Fund v. Continental Assurance Co.*, 700 F.2d 889, 892 (2d Cir. 1983) (Congress did not "intend [ ] . . . to grant subject matter jurisdiction over suits by employers, funds or other parties not listed in [§ 1132];" *Provident Life & Accident Ins. Co. v. Waller*, 906 F. 2d 985, 987 (4th Cir. 1990) (standing under ERISA should be limited only to those parties enumerated in § 1132); *Hermann Hosp. v. MEBA Medical & Benefits Plan*, 845 F.2d 1286, 1288-89 (5th Cir. 1988) ("Where Congress has defined the parties who may bring a civil action founded on ERISA, we are loathe to ignore the legislature's specificity"); *De Marco v. C & L Masonry, Inc.*, 891 F.2d 1236, 1241 (6th Cir. 1989) (holding that an employer did not have standing to sue a Trustee for breach of a fiduciary duty owed to the beneficiaries of the plan); *Giardono v. Jones*, 867 F.2d 409, 413 (7th Cir. 1989) (holding that courts

are without the power to expand their jurisdiction under ERISA in order to imply a cause of action for non-enumerated parties); *Grand Union Co. v. Food Employers Labor Relations Ass'n*, 808 F.2d 66 (D.C. Cir. 1987) (holding that an employer was not eligible to sue); *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 473 (10th Cir. 1990) (holding that although [ERISA] has a broad remedial purpose, only participants, beneficiaries, and fiduciaries . . . may avail themselves of its protections); *Gulf Life Ins. Co. v. Arnold*, 809 F.2d 1520, 1524 (11th Cir. 1987) (holding that "[ERISA's] standing provisions must be construed narrowly; civil actions under ERISA are limited only to those parties and actions Congress specifically enumerated in section 1132").

In *Curtis v. Nevada Bonding Corporation*, 53 F.3d 1023, 1026 (9th Cir. 1995), the court holds that without standing to enforce ERISA, there can be no ERISA preemption. Standing is a prerequisite to both subject matter jurisdiction and ERISA preemption. *Id.* at 1027, (citing *Peterson v. American Life & Health Insurance Co.*, 48 F.3d 404, 409 (9th Cir. 1995); see *Harris v. Provident Life and Accident Insurance Co.*, 26 F.3d 930 (9th Cir. 1994) (holding that it would be contradictory to rule that state law claims are preempted where the court has already held that the same plaintiffs may not assert a claim under ERISA because they [lack standing].

Coker did not assert any claims that give her standing under § 1132. (Rec. Vol. IV, pp. 910-952). Respondents did not address Coker's arguments that she lacked standing to enforce her claims under ERISA.

Moreover, the opinion of the court of appeals acknowledges that, Coker did not assert a cause of action under ERISA. (App. 3a).

The crux of Respondent's preemption argument was that Coker was the "Administrator" of an ERISA Plan with claims that called for an interpretation of the Plan thereby invoking § 1144 (preemption). Respondents relied on cases where the plaintiff was clearly an ERISA qualfied administrator under 29 U.S.C. § 1002(21)(A), i.e., a fiduciary of an ERISA plan with discretion over the assets and administration of the Plan; Respondents also relied on cases where plaintiffs had standing to enforce ERISA under § 1132.

Conversly, Coker was not a plan fiduciary under § 1002(21)(A) or § 1132. Moreover, in order to have standing to sue under ERISA as a "fiduciary," a party must be (or have been) a fiduciary of the plan *whose other fiduciaries are being sued for breach of duty.*" [emphasis supplied]. *Modern Woodcrafts, Inc. v. Hawley,* 534 F. Supp. 1000, 1014 (D. Conn. 1982) (holding that a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting the management of such plan or exercise authority or control respecting management or disposition of [the Plan's] assets, (ii) renders investment advice for a fee . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan); *Smith v. Hickey,* 482 F. Supp. 644, 650 (S.D.N.Y. 1979); *Northeast Dept. ILGWU Health and Welfare v. Teamsters Local Union No. 229 Welfare Fund,* 764 F.2d 147, 154 (3d Cir. 1985) (holding at p. 153 that § 1132 must be read narrowly or literally . . . such a reading precludes the interpretation

that a pension fund or a trustee (fiduciary) of a fund can sue under § 1132(a)(1)(B) on behalf of participants or beneficiaries; also holding at p. 155 that Section 1132(a)(3) contemplates fiduciaries **suing to enforce the terms of the plan,** meaning the terms of the plan regarding which they have a fiduciary duty). [emphasis supplied].

Persons defined as fiduciaries under 29 U.S.C. § 1105(c)(1)(B), are persons designated by named fiduciaries . . . to carry out fiduciary responsibilities (**other than trustee responsibilities**), [emphasis supplied], under the plan. Coker's job description specifies that she was to assist the trustees *in carrying out the trustees' responsibilities* under the plan. ERISA's definition of "fiduciary" thus expressly excludes Coker. Moreover, Respondents did not challenge Coker's claims that she lacked discretionary authority over the assets or administration of the Plan and the court of appeals did not address the matter. Coker had no standing to sue under ERISA as a fiduciary.

The opinion of the state court of appeals ignores Coker's argument that she lacks standing to enforce ERISA. Respondents did not address such argument in their responsive briefs and argued that ERISA preemption applied because the Plan had to be interpreted to determine if the trustees were authorized to make the unemployment loans under the terms of the Plan.

In dismissing Coker's case, both the trial court and the state court of appeals rely upon this Court's decision in *Ingersoll-Rand Company v. McClendon,* 111 S. Ct. 478, reversing a decision of the Texas Supreme Court, and

holding that ERISA preempted a wrongful discharge claim by an employee that his employer fired him to prevent him from obtaining pension benefits under his employer's ERISA plan. Significantly, the claim asserted by the plaintiff in *Ingersoll-Rand* falls squarely under § 1140 of ERISA which prohibits, among other things, the discharge of an employee for the purpose of interfering with the attainment of any right to which the employee, **as a plan participant**, may become entitled under the plan. Moreover, this Court noted in *Ingersoll-Rand* that ERISA provides an **exclusive** remedy for an employer's conduct in violation of § 1140. (Emphasis supplied). At oral arguments before this Court [and as stated in the Court's opinion], the employer's pension defeating motive in the termination was a significant factor. Moreover, the plaintiff in *Ingersoll-Rand* had standing to sue under § 1132 as a "plan participant". In *Alexander v. Anheuser-Busch Companies, Inc.*, 990 F.2d 536 (10th Cir. 1993), the court sets forth the criteria to qualify as a "participant" within the meaning of § 1132 as follows:

> . . . To be a "participant," a plaintiff must either be (1) an employee in, or reasonably expected to be in, currently covered employment; (2) a former employee with a reasonable expectation of returning to covered employment; (3) **a former employee with a colorable claim that he will prevail in a suit for benefits**; or (4) a former employee with a colorable claim that eligibility requirements will be fulfilled in the future. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117-18, 109 S.Ct. 948, 957-58, 103 L.Ed.2d 80 (1989); *Raymond*, 983 F.2d at 1532-33; 29 U.S.C. § 1002(7). [Emphasis supplied].

McClendon's claim clearly falls under items (3) and (4) in above quoted excerpt from *Alexander*. Conversely, Coker does not meet any of the criteria specified above.

Coker argued that the federal district court's remand of her case impliedly rejected defendants' ERISA preemption argument. (Rec. Vol. II, pp. 524-526); (Appellant's Brief pp. 34-37; Appellant's Reply Brief pp. 8-14). See also App. 24a, 26a, 38a. This Court has held that an ERISA preemption defense confers both subject matter and removal jurisdiction, despite the general rule that a federal question must appear on the face of the complaint. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 107 S.Ct. 1542, 95 L.Ed. 2d 55 (1987). Section 1144 [preemption clause of ERISA] allows ERISA to preempt state laws when they "relate to" matters governed by ERISA but that section of the statute does not create a federal cause of action for matters which only "relate to" ERISA's field of concern. *Warner v. Ford Motor Company*, 46 F.3d 531, 534 (6th Cir. 1995). In Coker's case, the matters the Court of Appeals finds to "relate to" an ERISA plan are more properly described as matters concerning ERISA's field of concern. However, the court's finding does not create federal subject matter jurisdiction over Coker's claims. *Id.* at 534.

The opinion of the court of appeals states that "because an inquiry must necessarily be directed to the underlying ERISA plan and its rules and regulations, plaintiff's **state causes of action** . . . **relate to** the ERISA benefit plan and are preempted by ERISA". [Emphasis supplied]. App. 11a. However, this finding ignores ERISA's standing requirement. ERISA preemption under § 1144 is not triggered *solely* because an inquiry must be directed to the underlying ERISA plan if the plaintiff's

claim is not subject to enforcement under ERISA. *Curtis v. Nevada Bonding Corporation, supra,* 53 F.3d at 1026-27 (standing is a prerequisite to both subject matter jurisdiction and ERISA preemption. Therefore, the state court's dismissal of Coker's claims, affirmed by the court of appeals, violates Coker's constitutional guarantee of due process of law and access to the courts.

The unsettled nature of ERISA's preemptive scope is evidenced by the decision of the state court of appeals in this case. The court quotes from *Goreman v. Life Ins. Co. of North America,* 811 S.W.2d 542, 545 (Tex. 1991), *cert. denied,* 502 U.S. 824 (1991), where the Texas Supreme Court finds that the state court lacked subject matter jurisdiction over plaintiff's claims ***for breach of fiduciary duty.*** [Emphasis supplied]. Those claims fell directly under federal subject matter jurisdiction pursuant to § 1132 [of ERISA]. *Goreman* at p. 547. However, the court in *Goreman* recharacterized the plaintiff's breach of contract claim as a claim for benefits under the plan thereby conferring the state court's concurrent jurisdiction over a claim for benefits under 29 U.S.C. § 1132(a)(1)(B). *Goreman* at p. 546, n. 5. The contract claim in *Goreman* was based on a claim for plan benefits under an insurance policy that formed part of an employee benefit plan. Therefore, the court's analysis of the plaintiffs' standing under § 1132 in *Goreman* should have made it obvious to the court of appeals that Coker's claims were not subject to state or federal subject matter jurisdiction [under ERISA] and therefore ERISA's preemption clause would not apply to Coker's case at all.

Instead, the court of appeals, without addressing the fact that Coker's case did not involve *any* claim enforceable

under § 1132 [unlike the claims asserted by the plaintiff in *Goreman*], finds [by implication] that federal subject matter jurisdiction applies to Coker's case under ERISA because it finds that Coker's claims come within ERISA's preemption clause [§ 1144]. The court then misapplies this Court's analysis in *Ingersoll-Rand*, as quoted in *Cathey v. Metropolitan Life Ins. Co.*, 805 S.W.2d 387, 389 (Tex. 1991), *cert. denied*, 501 U.S. 1232 (1991), and holds that state laws having an effect on employee benefit plans relate to such plans, and given the breadth of the preemption clause "state laws found to be beyond the scope of the preemption provision are few." App. 8a. The effect of the court's holding is that federal subject matter jurisdiction is invoked if a claim meets the criteria of § 1144 for preemption.

In the case, the state court's improper interpretation of the jurisdictional requirements of ERISA deprives Coker of her constitutional guarantee of due process of law in violation of the Fourteenth Amendment. Review of the decision below is important because of the confusion which exists over the jurisdiction requirements of ERISA under § 1132. This case presents the opportunity for this Court to address the issue and bring much needed certainty and uniformity to this area of ERISA by holding that standing under ERISA is a prerequisite to both subject matter jurisdiction and ERISA preemption. Without this Court's clarification of the Act's jursidictional requirements under § 1132, improper extension of ERISA preemption by state courts will continue to burden the federal system with cases such as the one presented now.

CONCLUSION

For the foregoing reasons certiorari should be granted and this case should be accepted for plenary review. In the alternative, certiorari should be granted and the decision below vacated and remanded to the state appeals court with instructions to reverse the state court's dismissal of Coker's case on the grounds of ERISA preemption.

Respectfully submitted,

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Attorneys for Petitioner

January 1997

APPENDIX A

JUDGMENT
COURT OF APPEALS
FOURTH COURT OF APPEALS
DISTRICT OF TEXAS

Court of Appeals

Fourth Court of Appeals District of Texas

San Antonio

[SEAL]

JUDGMENT

Appeal No. 04-95-00204-CV

Leaminda COKER,
Appellant,

v.

James P. DOUGLAS, A.A. COOK, Ray WILLIAMS, George E. SUMROW, Clifford HENDERSON, Charles MELTON, Individually and as Trustees of the IBEW Pension Trust Fund Local 716, and IBEW Pension Trust Fund Local 716, and the International Brotherhood of Electrical Workers, Local Union 716, Appellees.

Appeal from the 164th District Court of Harris County
Trial Court No. 90-016254
Honorable Katie Kennedy, Judge Presiding

BEFORE JUSTICE LÓPEZ, JUSTICE GREEN AND JUSTICE BUTTS[1]

In accordance with this Court's opinion of this date, the judgment of the trial court is AFFIRMED. It is ORDERED that appellees, James P. Douglas, A.A. Cook, Ray Williams, George E. Sumrow, Clifford Henderson, Charles Melton, IBEW Pension Trust Fund Local 716, and

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[1] Assigned to this case by the Chief Justice of the Supreme Court of Texas pursuant to TEX. GOV'T CODE ANN. § 74.003(b) (Vernon 1988).

the International Brotherhood of Electrical Workers, Local Union 716, recover their costs of this appeal from appellant Leaminda Coker and from the cash deposit in lieu of cost bond. After all costs have been paid, the clerk of the district court is directed to release the balance, if any, of the cash deposit to Veda Moore as attorney for appellant Leaminda Coker.

SIGNED February 28, 1996.

ALMA L. LÓPEZ, JUSTICE

Court of Appeals

Fourth Court of Appeals District of Texas

San Antonio

[SEAL]

OPINION

Appeal No. 04-95-00204-CV

Leaminda COKER,
Appellant,

v.

James P. DOUGLAS, A.A. COOK, Ray WILLIAMS, George E. SUMROW, Clifford HENDERSON, Charles MELTON, Individually and as Trustees of the IBEW Pension Trust Fund Local 716, and IBEW Pension Trust Fund Local 716, and the International Brotherhood of Electrical Workers, Local Union 716, Appellees.

Appeal from the 164th District Court of Harris County
Trial Court No. 90-016254
Honorable Katie Kennedy, Judge Presiding

Opinion by: Shirley W. Butts, Justice[1]

Sitting: Alma L. López, Justice
Paul W. Green, Justice
Shirley W. Butts, Justice

Delivered and Filed: February 28, 1996

AFFIRMED

Leaminda Coker, plaintiff below, appeals a summary judgment in favor of defendants, James P. Douglas, A.A. Cook, Ray Williams, George E. Sumrow, Clifford Henderson, and Charles Melton, individually and as Trustees of the IBEW Pension Trust Fund Local 716, and IBEW Pension Trust Fund Local 716, and the International Brotherhood of Electrical Workers, Local Union 716.

The case involves the plaintiff/employee Coker's allegations of wrongful termination, breach of employment contract, tortious interference with contract, emotional distress based on outrageous conduct, and conspiracy to interfere with contractual relations. Following the initial claim of wrongful termination, the remaining causes of action alleged by plaintiff all derive from that. She made no claim under ERISA.

The trial court granted summary judgment declaring that (1) no conduct of any defendant was outrageous as a matter of law; and (2) all other claims by plaintiff are

---

[1] Assigned to this case by the Chief Justice of the Supreme Court of Texas pursuant to TEX. GOV'T CODE ANN. § 74.003(b) (Vernon 1988).

preempted by the Employee Retirement Income Security Act of 1974 (ERISA) 29 U.S.C. §§ 1001-1461 (1988). The court entered a take-nothing judgment against plaintiff. We affirm.

Plaintiff brings seven points of error. The first two address the tortious interference with the contract claim. In point two, plaintiff asserts the court erred in ruling the defendants' conduct was not outrageous as a matter of law. Next, it is argued the court erred in holding that the contract of employment did not apply to her at the time of discharge. Point five is that the law of the case applies since a federal court ruled her case is governed solely by state law, thereby precluding summary judgment based on ERISA preemption.[2] In points six and seven, plaintiff contends her claims against the Union and IBEW were not preempted by ERISA.

In this summary judgment case, the facts shown by plaintiff are taken as true. *See Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). The motion for summary judgment for all defendants except the Union states:

> Defendants are entitled to dismissal of Plaintiff's claims of wrongful discharge and breach of contract because they are preempted by the [ERISA].

---

[2] Plaintiff's case was remanded to state court by the federal court. The Order states that plaintiff's cause of action is based exclusively on the decision of *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985). The court found that her cause of action did not arise under federal law. ERISA was not an issue in the motion to remove to federal court or in the response. Significantly, the court did not make any ruling based on ERISA.

It further states the *Sabine Pilot* wrongful discharge doctrine does not apply and that the required outrageous conduct required for a claim of intentional infliction of emotional distress is not involved as a matter of law. The Union's motion for summary judgment states it had no role in plaintiff's termination, which plaintiff conceded in her deposition. Further, the Union joins the other defendants' motion for summary judgment and relies on the ERISA preemption.

Plaintiff began employment in 1981 with the IBEW PENSION TRUST FUND Local 716 (the Fund), located in Houston. She later became the administrator of the Fund, holding that position until she was terminated on April 18, 1989. She was in charge of administration of the Fund as supervised by the defendant Trustees. One of plaintiff's duties was to administer loans to employees from the Fund. It is without dispute that the Fund is an employee benefit plan governed by ERISA and that loans may be made only according to the rules and regulations governing the Fund.

Plaintiff's petition alleged she discovered the Trustees were approving loans from the IBEW Trust Fund to employees she believed to be ineligible according to the Fund's rules and regulations. She refused to process these loans. Subsequently, plaintiff was discharged. She claimed the Union and Trustees acted in concert and conspired in approving the loans. She alleged that although economic and other "false" reasons were given, her discharge resulted because of her refusal to process the "illegal" loans. Deposition evidence reflects that hardship loans were made to employees who suffered economic losses in a nuclear project.

The "Relate To" Provision

Section 514(a) of ERISA provides:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all state laws insofar as they now or hereafter relate to any employee benefit plan described in section 1003(a) of this title.

The Texas Supreme Court in *Gorman v. Life Ins. Co. of North America* held:

> Section 1132(a)(1)(B) and (e) of ERISA provide that state courts of competent jurisdiction and district courts of the United States have concurrent jurisdiction of actions by a beneficiary: 1) to recover benefits due under the terms of the plan; 2) to enforce rights under the plan; or 3) to clarify rights to future benefits. Any other civil ERISA action is within the exclusive jurisdiction of the federal courts. 29 U.S.C. § 1132(e)(1) (1988). Accordingly, when a state court suit alleged in terms of a state common-law or statutory cause of action "relates to" an employee welfare benefit plan, ERISA may preempt the state law in favor of federal law.

Gorman v. Life Ins. Co. of North America, 811 S.W.2d 542, 545 (Tex. 1991), *cert. denied*, 502 U.S. 824 (1991). The *Gorman* court further held the petitioner's state common-law claim for breach of fiduciary duty relates to an employee benefit plan governed by ERISA, and since it is not a claim for one of the three above noted actions, ERISA preempts that cause of action. *Id.* at 547. However, the court also noted that the breach of contract claim to recover benefits could be recharacterized as a claim for

benefits due under the plan. Therefore, the state court had concurrent jurisdiction, but the case was subject to removal under ERISA. *Id.* at 548.

A state law, defined in section 1144(c)(1) to include all laws, decisions, rules, regulations, or other action having the effect of law, is preempted by ERISA only if it "relates to" a plan. 29 U.S.C. § 1144(a) (1988); *Cathey v. Metropolitan Life Ins. Co.*, 805 S.W.2d 387, 389 (Tex. 1991), *cert. denied*, 501 U.S. 1232 (1991). The question is whether a state law, as defined, relates to an employee benefit plan.

"A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection or reference to such a plan." *Cathey*, 805 S.W.2d at 389 (quoting *Shaw v. Delta Air Lines*, 463 U.S. 85, 96-97, 103 S. Ct. 2890, 77 L. Ed. 2d 490 (1983)); *see Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987) (common law cause of action – tort and contract – based on alleged improper processing of a benefit claim under employee benefit plan "relate to" an employee benefit plan and therefore fall under ERISA's preemption clause).

The *Cathey* court noted that the phrase "relate to" has been given a broad meaning and that "relate to" should be construed expansively.

> In keeping with this broad interpretation, the [United States Supreme] Court held that a cause of action for wrongful termination related to an ERISA plan where it was based on the allegation that the employer fired the employee to avoid paying benefits under a pension plan. *Ingersoll-*

Rand Co. v. McClendon, ___ U.S. ___, 111 S. Ct. 478, 112 L. Ed. 2d 474 (1990).

Cathey, 805 S.W.2d at 390. State laws having an effect on employee benefit plans relate to such plans. *Id.* Therefore, given the breadth of the preemption clause and the broad remedial purpose of ERISA, state laws found to be beyond the scope of the preemption provision are few. *Id.* (quoting *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290, 1294 (5th Cir. 1989)).

The plaintiff in *Southland Life Ins. Co. v. Estate of Small*, 806 S.W.2d 800 (Tex. 1991), was dismissed by her employer six months after an accident, and the insurance company ceased payment of medical expenses after the dismissal. Plaintiff sued for breach of contract, breach of duty of good faith and fair dealing, fraud, negligence, intentional infliction of emotional distress, and violations of the Texas Insurance Code, Deceptive Trade Practices Act, and ERISA. Citing *Gorman* and *Cathey*, the court held that the plaintiff's "claims are among those defined as relating to an employee benefit plan and are thus preempted by ERISA."[3] *Id.* at 801.

The question of law before the court in the present case is whether the causes under state laws as alleged by plaintiff relate to the employee benefit plan, IBEW Pension Trust Fund Local 716.

---

[3] It was not necessary for the trial court to make any determination as to "outrageous conduct" in connection with emotional distress since that cause of action was also preempted by ERISA.

To demonstrate that the acts of the Trustees and Fund were illegal, Plaintiff cites a possible violation of a state criminal statute, TEX. PENAL CODE ANN. § 32.45 (Vernon 1994) (misapplication of fiduciary property or property of financial institution). She contends the actual reason for her wrongful discharge was because she refused to perform illegal acts (processing loans). She relies on *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985), which created this narrow exception to the employment-at-will doctrine. In *Sabine Pilot*, however, the illegality of the act which Hauck refused to perform as ordered was clearly established: posted signs on the boat proclaimed it was illegal to pump bilges into the water, and the U.S. Coastguard confirmed this constituted a specific federal law violation. Further, there was no ERISA plan issue.

In the present case, unlike *Sabine Pilot*, the illegality of the acts is one of belief or speculation by plaintiff, and there is an ERISA plan. These electrical union workers, according to plaintiff's belief, were allegedly ineligible for such hardship loans from their own Fund employee accounts. She indicates the Trustees committed a crime by authorizing the unemployment loans. There clearly must be an interpretation of the Fund plan to determine whether the act of distributing pension funds in the form of unemployment loans to Fund participants was, in fact, unauthorized according to the specific terms of the ERISA benefit plan.

A federal court of appeals held that a former plan fiduciary's *Sabine Pilot* claim that he was discharged for refusing to commit an illegal act is preempted by ERISA when the alleged illegalities relate to his duties and responsibilities under the plan. *Anderson v. Electronic Data*

Systems Corp., 11 F.3rd 1311, 1314 (5th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 55, 130 L. Ed. 2d 14 1994). The court emphasized that Anderson's claim could not be resolved without construing the underlying ERISA plan. *Id.* at 1313-14. Further, the court noted the state law claim conflicted with the remedy provisions of ERISA. *Id.* at 1314.

Another case is instructive. The plaintiff in *Authier v. Ginsberg*, 757 F.2d 796 (6th Cir. 1985), *cert. denied*, 474 U.S. 888 (1985), was a former administrator of an employee welfare benefit plan governed by ERISA. Like the former administrator in the present case, Authier claimed wrongful discharge because he insisted on following legal requirements of the plan. Noting this involved regulation of an employee pension and welfare benefit plan, the court found the state law claims were preempted by ERISA. *Id.* at 802; *see also Hashimoto v. Bank of Hawaii*, 999 F.2d 408, 410 (9th Cir. 1993) (employee's claim of wrongful discharge and breach of employment contract as result of her complaint of alleged improprieties in administration of bank's profit-sharing, pension and severance plans preempted because related to ERISA plans which required interpretation).

Significantly, plaintiff acknowledged in her deposition that the eligibility of the employee/borrowers of hardship loans is "determined by the terms of the Plan itself . . . what standards they had to meet." The alleged illegalities relate to plaintiff's duties and responsibilities under the plan, as well as those of the Trustees. We find an interpretation of the benefit plan is required to determine whether the hardship loans were made in willful

disregard of the rules and regulations of the pension trust fund.

We hold that because the inquiry must necessarily be directed to the underlying ERISA plan and its rules and regulations, plaintiff's state causes of action against the IBEW Union, the named persons, both individually and as Trustees of the Fund, and the IBEW Trust Fund relate to the ERISA benefit plan and are preempted by ERISA. The summary judgment is proper. The points of error are overruled.

The judgment is affirmed.

SHIRLEY W. BUTTS
JUSTICE

DO NOT PUBLISH

APPENDIX B

THE SUPREME COURT OF TEXAS LETTER ORDER DENYING REVIEW

[SEAL]

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

October 18, 1996

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Sugarland, TX 77478-3435

Mr. Stuart B. Johnston
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Houston, TX 77002-6760

RE: Case Number 96-0398
Style: LEAMINDA COKER
v.
JAMES P. DOUGLAS, A.A. COOK, RAY WILLIAMS, GEORGE E. SUMROW, CLIFFORD HENDERSON, CHARLES MELTON, individually and as trustees of the IBEW PENSION TRUST FUND LOCAL 716, et al.

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error, as amended, with the notation "Writ Denied".

Sincerely,

John T. Adams, Clerk

by /s/ Michael C. Murphey
Michael C. Murphey, Deputy

APPENDIX C

ORDER
DISTRICT COURT OF
HARRIS COUNTY, TEXAS
164TH JUDICIAL DISTRICT

No. 90-16254

LEAMINDA COKER	§	IN THE DISTRICT
VS.	§	COURT OF
	§	
JAMES P. DOUGLAS, A.A. COOK, RAY WILLIAMS,	§	
GEORGE E. SUMROW,	§	HARRIS COUNTY,
CLIFFORD HENDERSON,	§	TEXAS
CHARLES MELTON,	§	
Individually and as Trustees of the IBEW Pension Trust	§	
Fund Local 716, IBEW	§	164TH JUDICIAL
PENSION TRUST FUND	§	DISTRICT
LOCAL 716, and	§	
INTERNATIONAL	§	
BROTHERHOOD OF	§	
ELECTRICAL WORKERS,	§	
LOCAL UNION 716	§	
	§	

ORDER

The Court has heard the motion for summary judgment filed in this cause by Defendants James P. Douglas, A. A. Cook, Ray Williams, George E. Sumrow, Clifford Henderson, Charles Melton and the IBEW Pension Trust Fund Local 716 (collectively the Defendants). All parties appeared by and through their respective counsel. The court, after examining the pleadings and the summary judgment evidence and hearing the arguments of counsel, determines that the Defendants are entitled to summary judgment as follows

a. The defendants motion for summary judgment on plaintiff's claim of intentional infliction of emotional

distress is GRANTED. The defendants conduct, which plaintiff alleges constituted the intentional infliction of emotional distress, was not "outrageous conduct" as a matter of law.

b. The defendant's motion for summary judgment on plaintiff's claims of breach of contract and wrongful discharge is GRANTED because these issues are preempted by the federal Employment Retirement Income Security Act (ERISA). The Texas breach of contract and wrongful discharge laws are preempted because the IBEW Pension Trust Fund Local 716 is an ERISA regulated pension plan, plaintiff is a covered recipient of the IBEW Pension Trust Fund Local 716 benefits, the Texas breach of contract and wrongful discharge laws "relate to," i.e. have a connection with or a reference the Pension Trust Fund Local 716, and the Pension Trust Fund Local 716 is a critical factor in establishing liability under Texas's wrongful discharge law.

c. The defendant's motion for summary judgment as to plaintiff's claim of civil conspiracy is likewise preempted because it is based on plaintiff's claims of breach of contract and wrongful discharge, which were preempted in paragraph b., above.

It is therefore ORDERED that defendants's [sic] motion for summary judgment is GRANTED. All relief not expressly granted herein is denied.

SIGNED April 29, 1994.

/s/ Katie Kennedy
Judge Katie Kennedy
Judge Presiding

APPENDIX D

FINAL JUDGMENT
DISTRICT COURT OF
HARRIS COUNTY, TEXAS
164TH JUDICIAL DISTRICT

No. 90-16254

LEAMINDA COKER Plaintiff, JAMES P. DOUGLAS, A.A. COOK, RAY WILLIAMS, GEORGE E. SUMROW, CLIFFORD HENDERSON, CHARLES MELTON, INDIVIDUALLY AND AS TRUSTEES OF THE IBEW PENSION TRUST FUND LOCAL 716, IBEW PENSION TRUST FUND LOCAL 716, AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 716 Defendants.	§	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS 164TH JUDICIAL DISTRICT

FINAL JUDGMENT

The Court granted summary judgment in favor of all defendants as to plaintiff's claim of intentional infliction of emotional distress because no conduct of any defendant was outrageous as a matter of law. The Court granted summary judgment in favor of all defendants as to all other claims by plaintiff because those claims are pre-empted by the Employee Retirement Income Security Act of 1974. Accordingly, final judgment in favor of all defendants is appropriate. It is, therefore,

ORDERED that Plaintiff Leaminda Coker take nothing by this suit and that Defendants James P. Douglas, A.

A. Cook, Ray Williams, George Sumrow, Clifford Henderson, and Charles Melton, individually and as Trustees, and IBEW Pension Trust Fund Local 716, and IBEW Local Union 716, be in all things discharged and go hence without day. All costs of Court are taxed against Plaintiff, for which let execution issue.

All other relief not expressly granted in this judgment is denied.

Signed this 31 day of October 1994.

/s/ Katie Kennedy
JUDGE PRESIDING

APPROVED AS TO FORM:

ATTORNEY FOR PLAINTIFF

/s/ Carrie Weitinger
CARRIE WEITINGER SBN 21115600

WEITINGER & WEITINGER

ATTORNEY FOR DEFENDANT IBEW

/s/ Illegible Flynn

/s/ Illegible
ATTORNEY FOR IBEW TRUST FUND AND DEFENDANTS JAMES P. DOUGLAS, A.A. COOK, RAY WILLIAMS, GEORGE E. SUMROW, CLIFFORD HENDERSON CHARLES MELTON, INDIVIDUALLY AND AS TRUSTEES OF THE IBEW PENSION TRUST FUND LOCAL 716, IBEW PENSION TRUST FUND LOCAL 716, AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 716

APPENDIX E

COURT OF APPEALS
LETTER DENYING REHEARING

COURT OF APPEALS
FOURTH COURT OF APPEALS DISTRICT
300 DOLOROSA, SUITE 3200
BEXAR COUNTY CRIMINAL JUSTICE CENTER
SAN ANTONIO, TEXAS 78205
HERB SCHAEFER, CLERK

April 2, 1996

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Robert L. Ivey
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1001 Fannin, Suite 2902
Houston, TX 77002-6760

RE: Court of Appeals Number: 04-95-00204-CV
Trial Court Case Number: 90-016254

Style: Leaminda Coker
v.
James P. Douglas; A.A. Cook; Ray Williams; George E. Sumrow; Clifford Henderson; Charles Melton, Individually and as Trustees of the IBEW Pension Trust Local 716; Et Al.

Dear Counsel:

The Appellant's Motion for Rehearing in the above styled and numbered cause has this date been DENIED.

Very truly yours,

HERB SCHAEFER, CLERK

/s/ Elise Dixon
Elise Dixon, Deputy Clerk

APPENDIX F

EXCERPTS FROM COKER'S MOTION FOR REHEARING IN THE STATE COURT OF APPEALS

EXCERPTS FROM COKER'S MOTION FOR REHEARING IN THE STATE COURT OF APPEALS

CAUSE NO. 04-9500204-CV
IN THE COURT OF APPEALS
FOURTH SUPREME JUDICIAL DISTRICT
OF SAN ANTONIO, TEXAS

LEAMINDA COKER, *PLAINTIFF/APPELLANT,* v. JAMES P. DOUGLAS, A.A. COOK, RAY WILLIAMS, GEORGE E. SUMROW, CLIFFORD HENDERSON, CHARLES MELTON, Individually and as Trustees of the IBEW PENSION TRUST FUND LOCAL 716, and IBEW PENSION TRUST FUND LOCAL 716, and the INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 716, *DEFENDANTS/APPELLEES.*	)( )( )( )( )( )( )( )( )( )( )( )( )( )( )( )(	* * *

On Appeal From the 164th Judicial District Court
Harris County, Texas

APPELLANT'S MOTION FOR REHEARING

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THOMAS W. MOORE
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ATTORNEYS FOR APPELLANT,
LEAMINDA COKER

* * *

STATEMENT OF POINTS OF ERROR

* * *

POINT OF ERROR THREE

The Court of appeals erred in overruling Points of Error 5, 6 and 7 on the grounds that the state laws upon which plaintiff relies in support of her claims "relate to" an employee benefit plan governed by ERISA and are therefore are [sic] preempted.

POINT OF ERROR FOUR

The Court of appeals erred in affirming a summary judgment based on ERISA preemption where the effect of the judgment violates the "open courts" provision of the Texas Constitution and the "due process" guarantees of both the Texas Constitution and the United States Constitution.

* * *

3. CONTENTIONS RELATING TO POINT OF ERROR NUMBER THREE

POINT OF ERROR NO. 3: **The Court of appeals erred in overruling Points of Error 5, 6 and 7 on the grounds that the state laws upon which plaintiff relies in support of her claims "relate to" an employee benefit plan governed by ERISA and are therefore preempted.**

The authorities cited in this Court's opinion in support of its affirmance of the trial court's finding of ERISA preemption can be distinguished from plaintiff's case in that in each case the plaintiff was seeking a benefit under an ERISA plan. In *Ingersoll-Rand Co. v. McClendon*, ___ U.S., 111 S. Ct. 478, 112 L. Ed. 2d 474 (1990), the "state law" relied upon by the plaintiff "depended upon" the existence of a benefit plan in the context that the plaintiff was seeking to enforce rights as a beneficiary under a plan to obtain benefits under the plan. In that case the Supreme Court of the United States placed a great deal of emphasis upon the fact that ERISA contained an exclusive enforcement mechanism where an employee is fired in order to keep him from vesting in a pension plan, i.e.,

to keep him from receiving benefits under a plan. In deciding whether plaintiff's claim of wrongful discharge "relates to" an ERISA plan, this Court is required to focus on the employer's motivation in the firing and only if the employer's conduct which gives rise to the wrongful discharge claim is also integral to a claim for benefits under the plan does ERISA preempt the wrongful discharge. Texas [statutory] law prohibiting termination of an employee to keep him from vesting in a pension plan is virtually identical to the ERISA provision covering the same subject matter as the Texas law relied upon by the plaintiff in *Ingersoll-Rand*. Moreover, the conduct of the employer, attempting to avoid paying plaintiff benefits under the plan, is the subject of the Texas statute involved in *Ingersoll-Rand*. Moreover, the facts relating to the employer's conduct and motivation in the termination are integral to the employee's claim for benefits under the plan in that case.

* * *

The plaintiff seeks no benefit under the Plan and does not seek any right [as a beneficiary] under the Plan or any relief that would affect the Plan.

* * *

The law is clear that an ERISA plan can be sued in tort just as any other party and such claims are not preempted just by virtue of the fact that the defendant is an ERISA plan. See *General American Life Ins. Co. vs. Castonguay*, 984 F.2d 1518 (9th Cir. 1993).

* * *

Plaintiff was not a "fiduciary" under the plan in this case.

* * *

The issue involves only the employer-employee relationship between IBEW and plaintiff and whether IBEW's discharge of plaintiff *for those reasons,* was wrongful under Texas law. The Federal Court determined as much in its Order remanded this case to the State District Court on the grounds that plaintiff's causes of action were founded solely under State law and no federal jurisdiction existed. The question of jurisdiction of state courts in actions involving 29 U.S.C. 1132 [ERISA] must be determined solely by reference to allegations in a plaintiff's complaint, not on the basis of issues raised in a defendant's answer. Therefore, the federal court's findings of no removal jurisdiction were based on the same criteria the federal court would consider in determining whether ERISA preempted plaintiff's wrongful discharge and other claims. The result would be that no federal jurisdiction existed under ERISA based on the allegations in plaintiff's pleadings.

* * *

The trustees were responsible for employment decisions relating to plaintiff and had the authority to fire plaintiff only for just cause, as stated in plaintiff's written contract of employment. The issue therefore with respect to that cause of action was whether the trustees had "just cause" to fire plaintiff. The common law of breach of contract in this case obviously does not "relate to" a plan in the context of ERISA preemption.

This Court's reliance on *Anderson v. Electronic Data Systems, Corp.*, 11 F. 3d 1311, 1314 (5th Cir. 1994), cert. denied, ___ U.S. ___, 115 S. Ct. 55, 130 L. Ed. 2d 14 (1994)

and *Authier v. Ginsberg*, 757 F.2d 796 (6th Cir. 1985), cert. denied, 474 U.S. 888 (1985), is misplaced. Plaintiff in this case was not the Administrator charged with administering the ERISA plan as was the plaintiff in *Anderson*. Defendants conceded at oral argument that plaintiff could only act with approval of the trustees. The trustees were the named "Administrator" of the plan within the meaning of ERISA. Plaintiff was not an "Administrator" within the purview of ERISA. Plaintiff had no authority to carry out any plan provision without prior trustee instruction and approval. This case does not involve plaintiff's conduct as the fiduciary charged with administering the plan. The point is significant because ERISA regulates plan fiduciaries such as the Administrator of the plan.

* * *

4. CONTENTIONS RELATING TO POINT OF ERROR NUMBER FOUR.

POINT OF ERROR NO. 4: **The Court of appeals erred in affirming a summary judgment based on ERISA preemption where the effect of the judgment violates the "open courts" provision of the Texas Constitution and the "due process" guarantees of both the Texas Constitution and the United States Constitution.**

The trial court's summary judgment in favor of defendants on the grounds of ERISA preemption, affirmed by this Court's opinion, leaves plaintiff without a remedy. Significantly, *plaintiff has no cause of action under ERISA*. The trial court impermissibly expanded the scope

of ERISA to apply to claims which relate only to plaintiff's termination of employment and not to the denial of benefits. A claim does not relate to a plan even though the employer's conduct occurred contemporaneously with an alleged ERISA violation, unless the facts relevant to the state law claims relate to the employee's failure to receive benefits. Plaintiff has not asserted any claim for benefits under an ERISA plan in this case. As found in the Federal District Court's Order remanding plaintiff's case to State District Court, plaintiff's case arises solely under the wrongful discharge laws of Texas.

* * *

The Texas wrongful discharge law involved in this case in no way purports to regulate an ERISA plan in this case. ERISA contains no provision or remedy to redress the wrongs claimed by plaintiff in this case. Any remedy afforded plaintiff under her common law causes of action asserted in this case would not impact upon the law of ERISA or require application of any provision of ERISA. Plaintiff asserts cognizable common-law causes of action which are being restricted by the trial court's unauthorized expansion of ERISA preemption and that restriction, balanced against the purpose of ERISA, is unreasonable and arbitrary. It was error for this Court to affirm the trial court's summary judgment based upon a finding of ERISA preemption where such judgment has the effect of infringing plaintiff's constitutional guarantee of access to the courts of this state to redress wrongs against her.

Plaintiff is thus denied her day in court and is denied the *due course of law* guarantee of both the state and

federal Constitutions. The right to a day in court and the privilege of being heard before judgment is the essence of due process of law and that privilege has been taken away from plaintiff.

Article 1, Section 13 of the Texas Constitution provides that "[all courts shall be open, and every person for an injury done to him in his lands, goods, person or reputation, shall have a remedy by due course of law." This provision, and Section 19 of the Texas Constitution, as well as U.S.C.A. Const. Amend. 14, guarantees every person the right of due process of law. The trial court's summary judgment, affirmed by this Court, violates plaintiff's constitutional rights.

* * *

APPENDIX G

EXCERPTS FROM COKER'S SUPPLEMENT TO MOTION FOR REHEARING IN THE STATE COURT OF APPEALS

EXCERPTS FROM COKER'S SUPPLEMENT TO MOTION FOR REHEARING IN THE STATE COURT OF APPEALS

CAUSE NO. 04-9500204-CV
IN THE COURT OF APPEALS
FOURTH SUPREME JUDICIAL DISTRICT
OF SAN ANTONIO, TEXAS

LEAMINDA COKER,	)(
PLAINTIFF/APPELLANT,	)(
	)(
v.	)(
JAMES P. DOUGLAS, A.A. COOK, RAY WILLIAMS, GEORGE E. SUMROW, CLIFFORD HENDERSON, CHARLES MELTON, Individually and as Trustees of the IBEW PENSION TRUST FUND LOCAL 716, and IBEW PENSION TRUST FUND LOCAL 716, and the INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 716,	)(
	)(
DEFENDANTS/APPELLEES.	)(

SUPPLEMENT TO APPELLANT'S MOTION FOR REHEARING

TO THE COURT OF APPEALS:

Appellant, Leaminda Coker, files this Supplement to her Motion for Rehearing filed under the authority of Tex. R. App. P. 100(a) and requests this Court consider

this Supplement, and attachment, in considering the merits of Appellant's Motion for Rehearing.

SUPPLEMENT TO CONTENTIONS RELATING TO POINT OF ERROR NUMBER THREE

POINT OF ERROR NO. 3: **The Court of appeals erred in overruling Points of Error 5, 6 and 7 on the grounds that the state laws upon which plaintiff relies in support of her claims "relate to" an employee benefit plan governed by ERISA are therefore are preempted.**

Attached to this Supplement is a copy of the transcript from the oral argument before the United States Supreme Court in the case of *Ingersoll-Rand Co. v. McClendon*, ___ U.S., 111 S. Ct. 478, 112 L. Ed. 2d 474 (1990). Appellant has consistently argued before the trial court and before this Honorable Court that the wrongful discharge cause of action plead by plaintiff in the case at bar does not "relate to" an ERISA plan. Appellant does not seek to enforce any rights under an ERISA plan, nor does Appellant state any claim for benefits under an ERISA plan. Appellant in fact has no cause of action under ERISA.

The questions and comments of the Supreme Court Justices in the attached transcript, as well as the answers to those questions, make clear that in order for ERISA to preempt a wrongful discharge claim, the employee must prove that the purpose of her discharge was to deprive her of benefits under the plan or where the employer's termination of the employee "interferes with plan benefits." See p. 7 of attached transcript, and other highlighted sections of the transcript.

Also, the Court's comments on p. 15 demonstrate that the [ERISA] statute does not require that the cause of action "relate to the terms or conditions of an ERISA plan." This Court has reasoned that Coker's cause of action "relates to" an ERISA plan because the Plan will have to be interpreted. The central issue of ERISA pre-emption in the context of a wrongful discharge case in Texas, is the employer's motivation and that motivation *must be a pension defeating motive.* This is stated specifically by the Supreme Court in the *Ingersoll-Rand* case at p. 483. The Court holds: ***"Thus, in order to prevail, a plaintiff must plead, and the court must find, that an ERISA plan exists and the employer had a pension-defeating motive in terminating the employment."*** [emphasis supplied]. Appellant's case DOES NOT meet this criteria and her wrongful discharge case, as plead, does not make any allegations that her employer's motive in terminating her was in any way "pension defeating."

Appellant's wrongful discharge claim arises solely under the Texas public policy common law exception to the employee at will doctrine.

* * *

APPENDIX H

EXCERPTS FROM COKER'S APPLICATION FOR WRIT OF ERROR IN THE TEXAS SUPREME COURT

NO. 96-0398

IN THE

SUPREME COURT

OF TEXAS

LEAMINDA COKER,

Petitioner,

VS.

JAMES P. DOUGLAS, A.A. COOK, RAY WILLIAMS, GEORGE E. SUMROW, CLIFFORD HENDERSON, CHARLES MELTON, Individually and as Trustees of the IBEW PENSION TRUST FUND LOCAL 716, and IBEW PENSION TRUST FUND LOCAL 716, and the INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 716,

Respondents.

Appealed From the Fourth Court of Appeals
Bexar County, Texas; Cause No. 04-9500204-CV

APPLICATION FOR WRIT OF ERROR
[Corrected]

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Leaminda Coker

ORAL ARGUMENT REQUESTED

* * *

POINT OF ERROR THREE
(Restated)

The Court of appeals erred in overruling Points of Error 5, 6 and 7 on the grounds that the state laws upon which plaintiff relies in support of her claims "relate to" an employee benefit plan governed by ERISA and are therefore preempted.

ARGUMENT AND AUTHORITIES FOR POINT OF ERROR THREE

Respondents, as defendant-movants, were required to establish their defense of ERISA preemption as a matter of law. *Citizens First Nat. Bank Etc. v. Cinco Explor.*, 540 S.W.2d 292, 294 (Tex. 1976); *Munoz v. Gulf Oil Co.*, 693 S.W.2d 372, 373 (Tex. 1984).

In raising the defense that petitioner's case is preempted by that Act, respondents were required to show that petitioner's claims fell within the statute as a matter of law. *Hernandez v. Lukefahr*, 879 S.W.2d 137, 140 (Tex.App. – Houston [14th Dist.] 1994, no writ).

Coker's claim does not fall within the scope of civil actions available under the Act and the Act's preemption clause therefore does not apply. As demonstrated above, respondents wholly failed to establish that Coker was either an ERISA administrator or fiduciary. It is undisputed that Coker did not assert any claims as a beneficiary/participant of an ERISA plan. Coker did not seek recovery of any benefits under the plan nor did Coker

seek to enforce any substantive provision of the plan. Therefore, the court's disposition of Coker's claims would have absolutely no effect on the body of law regulating ERISA plans.

There are different types of civil actions available under 29 U.S.C. Sec. 1132 [ERISA]. It should be noted that the actions listed are available only to a "beneficairy" or "participant" or an [ERISA] "fiduciary" who asserts the type of claims described. Section 502 of the Act provides, in pertinent part, as follows:

> (a) A civil action may be brought –
>
> (1) by a ***participant or beneficiary*** –
>
> (B) ***to recover benefits*** due to him under the terms of the plan, ***to enforce his rights*** under the terms of the plan, or ***clarify his rights to future benefits*** under the terms of the plan;
>
> (2) by a participant, beneficiary, **or fiduciary** (a) to enjoin an act or practice which violates any provision of this subchapter or the terms of the plan, or (b) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this subchapter or the terms of the plan.

[emphasis supplied]. It is not disputed that Coker did not bring any claim in the capacity of either a participant, beneficiary or fiduciary for any of the relief described above. Moreover, respondents did not establish that Coker was an ERISA fiduciary as a matter of law. See *Donovan v. Mercer*, 747 F.2d 304 (5th Cir. 1984), ("fiduciary" should be defined not only by reference to particular

titles . . . but also by considering the authority which a particular person has or exercises over an employee benefit plan). As stated in the written Trust, as a mere assistant to the trustees, Coker did not have any discretionary authority with respect to the Plan.

Paragraph (21)(a) of Section 1002 of ERISA defines "fiduciary" for purposes of the Act as follows:

(21)(a) Except as otherwise provided in subparagraph

> (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any **discretionary authority or control respecting management or disposition of its assets,** (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title. [emphasis supplied].

In addition, Respondents failed to establish that Coker was an ERISA administrator as a matter of law. Coker was given the job title of "Administrator" by the trustees, but the trust instrument imposes all responsibility and duties with respect to the assets of the ERISA Plan upon the trustees alone. (Appendix 2).

29 U.S.C. Sec. 1002(16)(A) defines an "administrator" for purposes of the statute [ERISA]:

> (16)(a) The term "administrator" means –
>
> (i) the person ***specifically so designated by the terms of the instrument under which the plan is operated;***
>
> (ii) if an administrator is not so designated, the plan sponsor; or
>
> (iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

[emphasis supplied]. Respondents did not establish as a matter of law that Coker meets any of the above criteria. Respondents cannot avoid their burden to establish that Coker was an ERISA administrator simply because she was given the title "Administrator" by her Employer. Unless respondents establish that Coker was an ERISA "fiduciary" or "administrator" as a matter of law, and/or that she seeks relief in her suit as a beneficiary/participant of an ERISA plan, Coker's suit is not subject to a claim that ERISA's preemption section applies.

29 U.S.C. Sec. 1140 [ERISA] specifically prohibits, among other things, the discharge of an employee for the purpose of interfering with the attainment of any right to which the employee, as a plan participant, may become entitled under the plan. This section triggered ERISA preemption in *Ingersoll Rand, supra.* Preemption in the case was unavoidable because the United States Supreme Court found that the employee's claim was really a

"claim for benefits." Preemption of state law claims by ERISA depends on the conduct to which such law is applied, not on the form or label of the law. *Morishige v. Spencecliff Corporation*, 720 F. Supp. 829, 838 (D. Hawaii, August 4, 1989). A state law claim does not "relate to" an employee benefit plan and is not preempted by ERISA *unless* facts relating to the employee's failure to receive benefits are relevant to the state law claim. *Farlow v. Union Cent. Life Ins. Co.*, 874 F.2d 791 (11th Cir. 1989). In *Farlow*, the court held that a claim did not relate to a plan even though the employer's conduct occurred contemporaneously with an alleged ERISA violation, *unless* the facts relating to the employee's failure to receive benefits *are relevant to the state law claim. Id.* at 794.

In *Ingersoll-Rand*, the motivation of the employer in firing the plaintiff was to avoid paying pension benefits. *Ingersoll-Rand* requires that the employer's motivation be "pension defeating." It is undisputed that there is no pension defeating motive involved in this case. Coker filed a supplement to her Motion for Rehearing in the court of appeals, providing that court with a copy of the transcript of oral argument in the *Ingersoll-Rand* case. The focus of the Court at oral argument on the employer's motivation [for the termination] supports Coker's contentions that ERISA does not preempt her claims because she is not seeking to recover any benefits or enforce any rights under an ERISA plan. The fact that Coker's case concerns only an employer/employee relationship and not a beneficiary/participant/fiduciary relationship, is also key.

* * *

Coker does not need to prove that she is entitled to her job under the terms of the plan or that the trustees engaged in misconduct with respect to their fiduciary positions under the plan. Coker need only prove that she was fired because she refused to participate in conduct which exposed her to criminal prosecution. As argued above, preemption of state laws by ERISA depends on the conduct to which the law is applied. *Morishige,* supra.

* * *

POINT OF ERROR FOUR
(Restated)

The Court of appeals erred in affirming a summary judgment based on ERISA preemption where the effect of the judgment violates the "open courts" provision of the Texas Constitution and the "due process" guarantees of both the Texas Constitution and the United States Constitution.

As argued under Point of Error Three above, petitioner's claim does not come within any of the criteria of 29 U.S.C. Sec. 502 [ERISA]. The trial court's summary judgment in favor of respondents on the grounds of ERISA preemption leaves petitioner without a forum to address her claim. The trial court erroneously applied ERISA's preemption clause in a vacuum and found preemption of claims which are not within the scope of the Act as set forth in Section 502. *Farlow, supra.*

As a matter of law, a claim does not relate to a plan even though the employer's conduct occurred contemporaneously with an alleged ERISA violation, unless the facts relevant to the state law claims relate to the

employee's failure to receive benefits. Petitioner has not asserted any claim for benefits under an ERISA plan in this case.

A federal judge has ruled that Coker's case arises solely under the wrongful discharge laws of Texas and does not present a federal question. (See Appendix 3). The Texas wrongful discharge law involved in this case in no way purports to regulate an ERISA plan. ERISA contains no provision or remedy to redress the wrongs claimed by petitioner in this case.

Any remedy afforded Coker under her common law causes of action asserted in this case would not impact upon the law of ERISA or require application of any provision of ERISA. Coker asserts cognizable common-law causes of action which are being restricted by the trial court's erroneous expansion of ERISA preemption and that restriction, balanced against the purpose of ERISA, is unreasonable and arbitrary.

It was error for the court of appeals to affirm the trial court's summary judgment based upon a finding of ERISA preemption where such judgment has the effect of infringing petitioner's constitutional guarantee of access to the courts of this state to redress wrongs against her.

Petitioner is thus denied her day in court and is denied the *due course of law* guarantee of both the state and federal Constitutions. The right to a day in court and the privilege of being heard before judgment is the essence of due process of law and that privilege has been taken away from Coker. The trial court and the court of appeals dismiss the findings in the federal judge's Remand Order. The court of appeals fails to accord any

consideration to such Order based upon an erroneous conclusion that the ERISA argument was not before the federal court when the Remand Order was entered. See argument under the STATEMENT section above. Coker's claims did not hold her case in federal court and now the state court refuses to hear her claims.

Article 1, Section 13 of the Texas Constitution provides that "[a]ll courts shall be open, and every person for an injury done to him in his lands, goods, person or reputation, shall have a remedy by due course of law." This provision, and Section 19 of the Texas Constitution, as well as U.S.C.A. Const. Amend. 14, guarantees every person the right of due process of law. The trial court's summary judgment, affirmed by the court of appeals, violates plaintiff's constitutional rights.

* * *

APPENDIX I

AMENDMENT XIV TO THE CONSTITUTION OF THE UNITED STATES

Amendment XIV.

The Fourteenth Amendment was ratified July 9, 1868.

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer

of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX J

29 U.S.C. § 1132 [ERISA]

29 U.S.C. § 1132 Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought –

(1) by a participant or beneficiary –

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan; or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (*l*);

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 609(a)(2)(A) [29 U.S.C. 1169(a)(2)(A)]);

(8) by the Secretary, or by an employer or other person referred to in section 101(f)(1) [29 U.S.C. 1021(f)(1)], (A) to enjoin any act or practice which violates subsection (f) of section 101 [29 U.S.C. 1021(f)], or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; or

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title [29 U.S.C. 1101-1114] or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of title 26 (or with respect to which an application to so qualify has been filed and has not been finally

determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if –

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form

(1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title or section 1021(e)(1) of this title with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or

beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 1021(b)(4) of this title. For purposes of this paragraph, an annual report that has been rejected under section 1024(a)(4) of this title for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 1021(d) of this title with respect to any participant or beneficiary or who fails to meet the requirements of section 1021(c)(2) of this title with respect to any person may in the court's discretion be liable to such participant or beneficiary or to such person in the amount of up to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(4) The Secretary may assess a civil penalty of not more than $1,000 for each violation by any person of section 101(f)(1) [29 U.S.C. 1021(f)(1)]. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be

treated as a separate violation. The Secretary and the Secretary of Health and Human Services shall maintain such ongoing consultation as may be necessary and appropriate to coordinate enforcement under this subsection with enforcement under section 1144(c)(8) of the Social Security Act [42 U.S.C. 1320b-14(c)(8)].

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by

the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 101(f)(1). State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan –

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of –

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate. For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of title 26.

(h) Service upon Secretary of Labor and Secretary of the Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be

served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed five percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of title 26) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of title 26.

(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of title 28), but all

such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor

Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(l) Civil penalties on violations by fiduciaries

(1) In the case of –

(A) any breach of fiduciary responsibility under (or other violation of) part 4 of this subtitle by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person; the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1) –

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that –

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan (or to provide the relief ordered pursuant to subsection (a)(9)) without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of title 26.

(m) In the case of a distribution to a pension plan participant or beneficiary in violation of section 206(c) [29 U.S.C. 1056(e)] by a plan beneficiary, the Secretary shall assess a penalty against such fiduciary in an amount equal to the value of the distribution. Such penalty shall not exceed $10,000 for each such distribution.

APPENDIX K

29 U.S.C. § 1144 [ERISA]

29 U.S.C. § 1144 Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(b) Construction and application

(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title.

(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

(5)(A) Except as provided in subparagraph (B), subsection (a) of this section shall not apply to the Hawaii Prepaid Health Care Act. (Haw. Rev. Stat. § 393-1 through 393-51).

(B) Nothing in subparagraph (A) shall be construed to exempt from the subsection (a) of this section –

(i) any State tax law relating to employee benefit plans, or

(ii) any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for more than the effective administration of such Act as in effect on such date.

(C) Notwithstanding subparagraph (A), parts 1 and 4 of this subtitle, and the preceding sections of this part to the extent they govern matters which are governed by the provisions of such parts 1 and 4, shall supersede the Hawaii Prepaid Health Care Act (as in effect on or after January 14, 1983), but the Secretary may enter into cooperative arrangements under this paragraph and section 1136 of this title with officials of the State of Hawaii to assist them in effectuating the policies of provisions of such Act which are superseded by such parts 1 and 4 and the preceding sections of this part.

(6)(A) Notwithstanding any other provision of this section –

(i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides –

(I) standards requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a pian must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this subchapter, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this subchapter.

(B) The Secretary may, under regulations which may be prescribed by the Secretary, exempt from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured. Any such exemption may be granted with respect to any arrangement or class of arrangements only if such arrangement or each arrangement which is

a member of such class meets the requirements of section 1002(1) and section 1003 of this title necessary to be considered an employee welfare benefit plan to which this subchapter applies.

(C) Nothing in subparagraph (A) shall affect the manner or extent to which the provisions of this subchapter apply to an employee welfare benefit plan which is not a multiple employer welfare arrangement and which is a plan, fund, or program participating in, subscribing to or otherwise using a multiple employer welfare arrangement to fund or administer benefits to such plan's participants and beneficiaries.

(D) For purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a State.

(7) Subsection (a) of this section shall not apply to qualified domestic relations orders (within the meaning of section 1056(d)(3)(B)(i) of this title), qualified medical child support orders (within the meaning of section 609(a)(2)(A) [29 U.S.C. 1169(a)(2)(A)], and the provisions of law referred to in section 609(a)(2)(B)(ii) [29 U.S.C. 1169(a)(2)(B)(ii)] to the extent enforced by qualified medical child support orders.

(8) Subsection (a) of this section shall not be construed to preclude any State cause of action –

(A) with respect to which the State exercises its acquired rights under section 609(b)(3)

[29 U.S.C. 1169(b)(3)] with respect to a group health plan (as defined in section 607(l) [29 U.S.C. 1167(l)], or

(B) for recoupment of payment with respect to items or services pursuant to a State plan for medical assistance approved under title XIX of the Social Security Act [42 U.S.C. 1396 et seq.] which would not have been payable if such acquired rights had been executed before payment with respect to such items or services by the group health plan.

(c) Definitions

For purposes of this section:

(1) The term "state law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "state" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of the United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(c) of this title) or any rule or regulation issued under any such law.

APPENDIX L

REMAND ORDER
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LEAMINDA COKER,	§	
	§	
Plaintiff,	§	CIVIL
	§	ACTION
vs.	§	NO. H-93-1198
	§	
JAMES P. DOUGLAS, *et al.*,	§	
	§	(Filed
Defendants.	§	June 3, 1993)

REMAND ORDER

Plaintiff filed this action in state court in April 1990, alleging that "Shortly before her discharge on April 19, 1989, plaintiff discovered that the defendant trustees were approving and recommending loans from the IBEW Trust Fund to persons who were not eligible to receive the same as directed by the applicable rules and regulations governing the Fund. When the plaintiff was ordered, and refused, to process the illegal loans she was discharged by the defendants, who gave her fabricated untrue reasons for her discharge." In February 1993, Plaintiff filed an amended complaint asserting that "In the fall of 1988, plaintiff discovered that the defendant trustees were approving and recommending Unemployment Hardship Loans from the IBEW Trust Fund to persons who were not eligible to receive the same as directed by the applicable rules and regulations set forth in Exhibit F [copy of the Pension Plan]. As Administrator, plaintiff was required to assist the trustees by processing the illegal loans: when plaintiff refused and attempted to

stop the illegal loans, she was discharged by the defendants who gave her fabricated untrue reasons for her discharge." In March 1993, Plaintiff responded to discovery requests regarding which laws support her claim by producing a photocopy of a federal statute. On April 22, 1993, Defendants filed their notice of removal. The case is now before the Court on Plaintiff's Motion for Remand.

Federal courts are courts of limited jurisdiction and removal statutes are construed under a strict construction analysis. *See Powers v. South Central United Food and Commercial Workers Unions*, 719 F.2d 760, 762 (5th Cir. 1983). Plaintiff's claim is based exclusively on the Texas Supreme Court decision *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985) which created an exception to the employment-at-will doctrine where an employee is discharged for refusing to commit an illegal act. The Court notes that the employee in *Sabine* was terminated for refusing to pump the bilges of his vessel at a place where it was prohibited by federal law. *Hauck v. Sabine Pilots, Inc.*, 672 S.W.2d 322, 323 (Tex. App. – Beaumont 1984). In the case at bar, the illegal act which Plaintiff alleges precipitated her discharge is a violation of both Texas law and federal law. The Courts finds that Plaintiff's cause of action does not arise under federal law. The federal issues, if any, are "collateral in nature, and are not substantial in relation to the claim as a whole, which is in essence one under state law." *Willy v. Coastal Corp.*, 855 F.2d 1160, 1171 (5th Cir. 1988) (cause of action for wrongful discharge under *Sabine* for refusal to violate state and federal law).

Based on the foregoing, it is hereby

ORDERED that Plaintiff's Motion for Remand (Entry #3) is GRANTED and this case is REMANDED for lack of subject matter jurisdiction to the 164th Judicial District Court of Harris County.

IT IS FURTHER ORDERED that Plaintiff's Motion for Costs and Expenses is DENIED.

SIGNED this 3rd day of June, 1993, at Houston, Texas.

/s/ Norman W. Black
NORMAN W. BLACK
CHIEF JUDGE

APPENDIX M

EXCERPTS FROM DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO REMAND AND REQUEST FOR COSTS AND EXPENSES IN FEDERAL DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LEAMINDA COKER, Plaintiff, vs. JAMES P. DOUGLAS, A.A. COOK, RAY WILLIAMS, GEORGE E. SUMROW, CLIFFORD HENDERSON, CHARLES MELTON, INDIVIDUALLY AND AS TRUSTEES OF THE IBEW PENSION TRUST FUND LOCAL 716, IBEW PENSION TRUST FUND LOCAL 716, AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 716, Defendants.	§ § § § § § § § § § § § § § § §	CIVIL ACTION NO. H-93-1198

EXCERPTS FROM DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO REMAND AND REQUEST FOR COSTS AND EXPENSES IN FEDERAL DISTRICT COURT

Defendants James P. Douglas, A.A. Cook, Ray Williams, George E. Sumrow, Clifford Henderson, Charles Melton, IBEW Pension Trust Fund Local 716 ("the Fund"), and International Brotherhood of Electrical Workers, Local Union 716 ("the Union") oppose Plaintiff's Motion to Remand and Request for Costs and Expenses as follows:

* * *

On March 26, 1993, in response to an interrogatory propounded by the Fund (the Fund's interrogatory, and Coker's response, is attached as Exhibit 2) to discover precisely what law she claimed she had been commanded to violate, Coker identified 18 U.S.C. § 664, a federal criminal statute which provides:

> Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or of any fund connected therewith, shall be fined not more than $10,000, or imprisoned not more than five years, or both.
>
> As used in this section, the term "any employee welfare benefit plan or employee pension benefit plan" means any employee benefit plan subject to any provision of title I of the Employee Retirement Income Security Act of 1974.

On April 22, 1993, because Coker's interrogatory response established that her right to relief necessarily depends on the resolution of a substantial question of federal law, Defendants removed the matter to this Court. Coker now seeks remand of the lawsuit to state court.

* * *

Coker's central argument in her Motion to Remand is that any construction of 18 U.S.C. § 664 is merely "collateral" to her underlying claim and that, therefore, her case does not "arise under" federal law. It is well settled, however, that where an essential element of a plaintiff's claim turns on a right or immunity created by federal law,

and where that claim is such that it will be supported if the federal law is given one construction or effect, and defeated if given another, federal subject matter jurisdiction exists and removal is proper. *Gully v. First National Bank in Meridian*, 299 U.S. 109, 112-13. *See also Franchise Tax Board v. Construction Laborers Vacation Trust*, 461 U.S. 1, 27-28 (1983); *Maxwell v. First National Bank of Monroeville*, 638 F.2d 32, 35 (5th Cir. 1981). Coker's reliance on 18 U.S.C. § 664 meets these criteria and therefore, the federal issues implicated by her action cannot be characterized as collateral or incidental.

Coker's articulated cause of action relies on *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W. 2d 733 (Tex. 1985), in which the Supreme Court of Texas determined that the sole public policy exception to the employment-at-will doctrine in Texas prohibits an employer from discharging an employee for refusing to obey a criminally unlawful order. *Id.* at 735. Simply stated, the essence of Coker's claim is that, because 18 U.S.C. § 664 imposed under her a duty – the breach of which would subject her to criminal penalties – not to commit certain acts allegedly commanded by her employer, she has the right to refuse to comply with certain directives from her employer without being subjected to discharge for so refusing. Because *Sabine Pilot* makes clear that a plaintiff bears the burden of proving that her discharge was "for no reason other than her refusal to perform an *illegal act*," *Id.* (emphasis added), the resolution of whether the acts Coker was allegedly commanded to perform did, in fact, violate the statute, is essential to her cause of action.

* * *

In her motion to remand, Coker alludes to a Texas criminal statute, Tex. Penal Code Sec. 32.45, with which Coker supplemented her response to the Fund's interrogatory, three days after Defendants' Notice of Removal.

* * *

As the second paragraph of 18 U.S.C. § 664 states, "the term 'any employee welfare benefit plan or employee pension benefit plan' means any employee benefit plan subject to any provision of Title I of the Employee Retirement Income Security Act of 1974." Added as an amendment to the pre-existing first paragraph of the statute in September 1974, this paragraph brings the statute within the all-encompassing scope of ERISA and Constitutes an admission by Coker – when she expressly identifies it as the law which would allegedly have been violated had she obeyed her employer's alleged commands – that her claims relate to employee benefit plans governed by federal law. Consequently, to the extent a state statute purports to define unlawful conduct with respect to the administration of such plans, it is superseded by the comprehensive regulatory scheme fashioned by Congress in ERISA. *Pilot Life Insurance v. Dedeaux*, 481 U.S. 41, 46 (1987); *See also, Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990).

* * *

Therefore, Coker's Motion to Remand should be denied and the Court should establish a Docket Control Order governing this case at its earliest convenience.

Respectfully submitted,

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APPENDIX N

COKER'S JOB DESCRIPTION (ATTACHED TO COKER'S APPLICATION FOR WRIT OF ERROR IN THE TEXAS SUPREME COURT AS APPENDIX)

COKER'S JOB DESCRIPTION (ATTACHED TO COKER'S APPLICATION FOR WRIT OF ERROR IN THE TEXAS SUPREME COURT AS APPENDIX 2)

* * *

employ such agents, attorneys, actuaries, auditors, or administrative or clerical assistants as they may deem advisable.

6.3 Rules and Decisions: All rules and decisions of the Trustees shall be uniformly and consistently applied to all Employees in similar circumstances. Any rule or decision of the Trustees which is not inconsistent with the provisions of the Plan shall be conclusive and binding upon all persons affected by it, except as may be otherwise provided by federal law.

6.4 Functions of Administrative Agent: The functions of the Administrative Agent shall be:

(a) To receive and deposit with the Custodian, on behalf of the Trustees, all contributions made by the Employers;

(b) To notify each delinquent Employer and the Trustees as to such Employer's delinquency in payment of contributions;

(c) To record each Employer's contributions in a ledger for that Employer;

(d) To record the hours worked within each calendar quarter by each Employee, for which hours contributions are made by Employers;

(e) To maintain a file of designation of beneficiary cards;

(f) To pay benefits as directed by the Trustees;

(g) To prepare reports as directed by the Trustees, and

(h) To otherwise assist the Trustees in the administration of the Plan.

6.5 Authorization of Benefit Payments: The Trustees shall issue directions to the Administrative Agent concerning all benefits which are to be paid from the Fund pursuant to the provisions of the Plan. The Administrative Agent shall keep on file, in such manner as it may deem convenient or proper, all directions from the Trustees. If, in the Trustees' judgment, any person to whom a benefit is payable is unable to care for his affairs because of illness, injury, or other incapacity, the Trustees may authorize his benefit to be paid to any person who, or institution which, in the Trustees' judgment, is caring for the person entitled to the benefit, or to any member of his family, or the Trustees may apply it directly for his benefit.

6.6 Employee Data: Each Employee and Employer shall from time to time furnish the Trustees and Administrative Agent with such data as may be considered necessary by the Trustees to administer the Plan. Each Employer shall fully cooperate with the Trustees and Administrative Agent in the administration of the Plan.

6.7 Eligibility Procedures: As a condition of his right to receive a benefit hereunder, each eligible Employee shall, in addition to fulfilling the eligibility requirements specified in Article IV, fulfill

* * *

No. 96-1143

Supreme Court, U.S.
FILED
MAR 17 1997

In The

Supreme Court of the United States

October Term, 1996

LEAMINDA COKER,

Petitioner,

vs.

JAMES P. DOUGLAS, A. A. COOK, RAY WILLIAMS, GEORGE E. SUMROW, CLIFFORD HENDERSON, and CHARLES MELTON, Individually and as Trustees of the IBEW PENSION TRUST FUND LOCAL 716, and IBEW PENSION TRUST FUND LOCAL 716, and the INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 716,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals for the Fourth Judicial District, Bexar County, Texas

RESPONDENTS' BRIEF IN OPPOSITION

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19 pp

QUESTIONS PRESENTED

Respondents object to the initial question articulated by Petitioner — *i.e.*, whether standing to enforce ERISA is a prerequisite to ERISA preemption — because it was never raised or decided below *and* because it is premised on Petitioner's mere assumption that she lacks standing to enforce the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.*

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Respondents James P. Douglas, A. A. Cook, Ray Williams, George Sumrow, Clifford Henderson, Charles Melton, IBEW Pension Trust Fund Local 716, and IBEW, Local Union 716 oppose Leaminda Coker's Petition for Writ of Certiorari as follows:

STATEMENT OF THE CASE

Contrary to Petitioner's sole contention, this case has never involved the issue of "whether standing to enforce ERISA is a prerequisite to ERISA preemption." Petitioner never argued, or even articulated, such an issue before either the Texas state trial court or the Texas Court of Appeals — the only judicial entities that have comprehensively analyzed the application of ERISA preemption to her claims. Although Petitioner subsequently attempted to assert radically different facts and legal theories in her Application for Writ of Error to the Texas Supreme Court, it is clear that she was estopped from the former, and had waived the latter. It logically follows, therefore, that none of those courts ever considered or ruled upon the questions she purports to bring before this Court. Petitioner misleads this Court by asserting otherwise.

Furthermore, the "important question" posed by Petitioner is purely academic in this case, representative of no genuine material dispute or controversy, because, even if she had properly raised it below, its answer would have been irrelevant to the disposition of her claims. Briefly stated, whether or not standing under ERISA is a prerequisite to ERISA preemption, the unanimous consensus of appellate courts that have analyzed identical claims by plaintiffs who, like Petitioner, were fiduciaries under an ERISA pension plan, is that such plaintiffs do, indeed, enjoy standing to bring such claims under ERISA.

A. Statement of Facts

The IBEW Pension Trust Fund ("the Plan") is an employee pension benefit plan within the meaning of the Employee Retirement Income Security Act of 1974 ("ERISA"), established jointly by IBEW Local Union 716 ("the Union") and the South Texas Chapter of the National Electrical Contractors' Association ("the Association"), pursuant to § 302c of the Labor Management Reporting Act, to provide retirement income and related services for electricians covered by collective bargaining agreements. (Sup. Tr. 25-26). *See also* 29 U.S.C. § 1002(2). Such collective bargaining agreements are the products of negotiation between electrical contractors in the Association and the Union, the exclusive bargaining representative of covered electricians. Under the Plan, contractors employing covered electricians make direct contributions, as part of the electricians' compensation, to the Plan and such cumulative contributions, along with whatever income they may earn, are maintained in the individual account of each Plan participant.[1] (Sup. Tr. 48-49).

Petitioner was employed by the Plan on October 19, 1981, and continued her employment until April 19, 1989, when she was discharged. (Tr. 913-15). At the time of her discharge, Petitioner was the Administrator of the Plan, subject to supervisory control by the Trustees. (*Id.*). Her duties included administering loans permissible under the Plan to qualified Plan participants. (Sup. Tr. 919-20). Loans contemplated by the Plan included so-called "hardship unemployment" loans, which were drawn — at the participant's request — from monies deposited in the Plan on behalf of the participant in his or her individual

1. As indicated above, the Plan participants are the electricians covered by the collective agreements between the Association and the Union. The terms "Plan participants" and "covered electricians" are used interchangeably, depending on the context.

account. All such loans were to be made according to the rules and regulations governing the Plan. (*Id.*).

In her lawsuit filed in the state district court of Harris County, Texas, in 1990, Petitioner claimed that, shortly before her discharge on April 19, 1989, and in her capacity as the Administrator of the Plan, she discovered that the Trustees were approving and recommending loans from the Plan to participants who, according to Petitioner, were not eligible to receive them under the applicable rules and regulations governing the Plan. (Tr. 920-22). It is undisputed that these allegedly improper loans were made to Plan participants solely from their own personal accounts. (Sup. Tr. 48-49). Petitioner further alleged in her Original Petition that she refused to continue processing those loans, after which she, as the person "in charge of administering" the Plan, was then wrongfully discharged for her refusal to perform acts which she claimed violated the terms of the governing Plan document and which, she claimed, would have exposed her to criminal penalties. (*Id.*) (*See* Original Petition, 3) .

Thus pled, Petitioner's allegations purported to state a wrongful discharge claim against the Plan and its individual Trustees under *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W. 2d 733 (Tex. 1985), in which the Texas Supreme Court had recognized a cause of action for one who claims that she was discharged for refusing to perform an unlawful act for which she would have been exposed to criminal penalties. Petitioner added other causes of action for intentional infliction of emotional distress, breach of employment contract, and civil conspiracy — all centered as well on her discharge. Petitioner also alleged that "[the] Union, through its duly authorized agent, wrongfully and illegally certified the ineligible loans" and claimed that the Trustees and the Plan itself were acting in concert and conspiring with the Union in terminating her employment. (Tr. 922-25).

B. Pertinent Procedural History

Petitioner filed this lawsuit in 1990. Following extensive discovery and other pre-trial activity, all Defendants/ Respondents moved for summary judgment in July, 1993, arguing that Petitioner's state law claims were preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*— both because they were directly related to the Pension Plan and because they would ultimately require an analysis and evaluation of a fiduciary's duties under the Plan. In response to Defendants' motion, Plaintiff/Petitioner argued simply, though repeatedly, that her claims arose solely under state law, were brought against the Plan and the Trustees only in their capacity as her employer, and did not "relate to" the Plan. At no time did she claim that she lacked standing to bring a claim under ERISA and that, therefore, ERISA preemption should not apply to her claims.

On April 29, 1994, after extensive additional briefing and argument by all parties, the District Court of Harris County, Texas, 164th Judicial District, granted the motion for summary judgment by all Respondents except the Union as to all of Petitioner's claims, expressly holding that her claims for wrongful discharge, breach of contract, and civil conspiracy are preempted by ERISA and that, as a matter of law, none of the conduct she alleged in support of her emotional distress claim was extreme or outrageous. On October 31, 1994, the court similarly granted summary judgment to the Union.

Following the entry of summary judgment against Petitioner, she appealed to the Texas Court of Appeals. In both her principal brief and her reply brief, Petitioner articulated — with one exception[2] — the same arguments she had advanced before the

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2. In her reply brief before the court of appeals, Petitioner suggested, (Cont'd)

trial court. Once again, she did not argue that she lacked standing to bring her action under ERISA. Consequently, the court of appeals did not address that issue or, of course, the logical related issue of whether standing under ERISA is a prerequisite for ERISA preemption.[3]

Following the court of appeals' denial of her petition for rehearing, Petitioner applied to the Texas Supreme Court for Writ of Error. Despite her "creative" new arguments that she was never a plan fiduciary, and her repeated argument that she had pled "no cause of action" under ERISA's enforcement provisions, the court denied her application.

(Cont'd)

for the first time in this litigation, that Respondents had failed to establish that she was the Administrator of the Plan — that is, failed to establish that she was a fiduciary governed by ERISA. In apparent recognition of Petitioner's failure to have raised this issue previously, and mindful that her entire lawsuit had centered from the beginning on her claim that she had refused to perform certain acts that would have allegedly consituted a criminal breach of her fiduciary duties, the court of appeals quite rightly disregarded that contention, concluding that Respondents' proof had met the high standard for obtaining summary judgment in Texas courts.

3. Petitioner admits (Petition for Certiorari, 6) that the court of appeals "did not address" a standing issue, but misleads this Court about having ever presented it. Although she now claims (*Id.*), that she argued "that she had no standing to enforce [her] claims under [ERISA]," her only citation to any such purported contention establishes merely that she argued before the court of appeals — in her petition for rehearing — and in her Application for Writ of Error to the Texas Supreme Court, that preemption was improper simply because she had not articulated a claim for benefits under the Plan. (*Id.*, and at Appendix to Petition, 23a, 26a, 33a, 37a-38a).

REASONS FOR DENYING THE WRIT

SUMMARY OF THE ARGUMENT

This case presents no issue warranting this Court's consideration. Petitioner has identified no disagreement among the circuit courts of appeals with respect to the questions she seeks to bring before the Court, nor any conflict between a decision of this Court and that of any other. Indeed, on the precise threshold issue she presents — whether standing to enforce ERISA is a prerequisite to ERISA preemption — Petitioner cannot even demonstrate that a decision of any kind has been rendered in this case, precisely because that issue was never presented and preserved below.

Furthermore, even if the issue Petitioner now articulates had been addressed to, and adjudicated by, the courts below, nothing in any prior decision or ruling in this case suggests that it was necessarily decided against Petitioner. Apparently understanding that the "important questions" she asks this Court to answer are purely academic if she, in fact, has standing under ERISA, Petitioner attempts to skirt this fundamental threshold issue by her mere assertion that she lacks such standing. That assertion is based on her similarly bare contention that she was not an ERISA plan fiduciary and that, therefore, she did not enjoy a fiduciary's right to proceed under 29 U.S.C. § 1132. She does not, however — indeed, she cannot — identify any decision below reaching such a conclusion, which is, logically, a necessary (but unarticulated) premise to the "important question" she seeks to impose upon this Court.

In fact, the most reasonable reading of the decisions below is that the Texas courts found that Petitioner was an ERISA fiduciary, and, consequently, would have found — had the issue been presented to them — that she had all the rights and

responsibilities accompanying that status. Stated another way, because the Texas courts were obviously satisfied that Respondents had established — consistent with the burdens of proof for Texas summary judgments — that Petitioner was a fiduciary of the Plan, their most likely conclusion (one can do nothing other than project an "educated guess" on this point since Petitioner never properly presented the questions she brings here) would have been that she had standing under ERISA. Moreover, that decision would have been consistent, rather than in conflict, with the Ninth Circuit Court of Appeals, the only court on whose decisions about standing and preemption Petitioner relies.[4]

ARGUMENT

Petitioner's Petition for Certiorari should be denied. She has identified no conflict or disagreement between or among circuit courts of appeals, between a decision by this Court and a decision by any other, or between any circuit court of appeals and a state court of last resort. Instead, Petitioner asserts that this case presents the "important question of whether standing to sue under ERISA is a prerequisite to both subject matter jurisdiction and ERISA preemption." (Petition for Certiorari, 13). Such an assertion is incorrect and misleads the Court.

Whatever the proper answer may be to Petitioner's "important question," this case simply does not ask it. None of

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4. In support of her argument that ERISA preemption should not apply to the claims of a plaintiff who lacks standing to sue under ERISA, Petitioner cites to *Curtis v. Nevada Bonding Corporation*, 53 F.3d 1023 (9th Cir. 1995) and *Harris v. Provident Life and Accident Insurance Co.*, 26 F.3d 930 (9th Cir. 1994). As is more fully set forth below, however, the Ninth Circuit has also held, on facts materially indistinguishable from those in this case, that a plaintiff such as Petitioner does, indeed, enjoy standing to proceed under ERISA. *Hashimoto v. Bank of Hawaii*, 999 F.2d 408 (9th Cir. 1993).

the Texas courts below rendered any decision on this purported question, undoubtedly because it was never articulated or argued before them. The trial court's summary judgment for Respondents is silent on any such issue, and a careful review of Petitioner's voluminous filings preceding the judgment uncovers no such contention.

Similarly, the decision of the Texas Fourth Court of Appeals, affirming the trial court's judgment, makes no mention of — and, obviously, does not address — any issue concerning "whether standing to sue under ERISA is a prerequisite to both subject matter jurisdiction and ERISA preemption." Once again, Petitioner's principal and reply briefs before the Fourth Court presented no such issue, nor did her petition for rehearing. Finally, in her Application for Writ of Error to the Texas Supreme Court, Petitioner did not raise or argue the contention that ERISA preemption should not apply to claims by a plaintiff who (allegedly) lacks standing to bring an action under ERISA.[5]

It is hardly surprising that neither Texas appellate court addressed this issue, since it was not specifically raised before either, or raised and preserved in antecedent proceedings. Petitioner now apparently seeks to circumvent the state appellate processes, and to be excused for the failure to raise it therein, by asking this Court to address an issue about which no presently identifiable dispute exists — indeed, about which, in this case, no identifiable decision has even been reached.

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5. A careful reading of the Petition for Certiorari further demonstrates the point. Although Petitioner repeatedly implies that the lower courts erred in concluding that ERISA preemption applies even to plaintiffs with no standing to sue under ERISA, she cites to no opinion or decision of any court below articulating such a conclusion. In fact, she identifies no opinion or decision containing any language that suggests that such an issue was even before any of the lower courts. Not coincidentally — and not surprisingly — Petitioner also cites to no pleading, brief, or other filing below in which she herself ever raised the issue.

Petitioner's attempt to seek review by this Court of an "important question" not presented or adjudicated in previous proceedings in this case is all the more objectionable because she has never adequately presented the necessary threshold question: whether she, as an ERISA plan administrator, has standing under ERISA to sue other plan fiduciaries to prevent alleged violations of the Plan, or to redress alleged retaliation against her for allegedly opposing such violations. Because Petitioner has never asked any lower court this question, she merely assumes that she lacks such standing and now asks this Court to grant certiorari to review both her assumption and the brand-new "important questions" she seeks to erect upon it. No other explanation of her petition is possible, since, just as she never previously raised the issue of whether standing to enforce ERISA is a prerequisite for preemption, she also never presented the related question of whether she, in fact, has such standing.

The closest Petitioner has ever come to raising either of these points occurred well after the trial court's summary judgment, in the late stages of her appeal before the Texas Fourth Court of Appeals. After having litigated this case for five years with one central premise — *i.e.*, that she was a fiduciary of the IBEW Pension Plan who was allegedly discharged for refusing to process allegedly unlawful loans under the Plan — Petitioner attempted, for the first time, in her ***reply*** brief before the court of appeals, to deny that she ever held any such fiduciary position under the Plan. Apparently, Petitioner hoped that this dramatic reversal of position would insulate her from ERISA preemption, just as she now relies on it in attempting to mislead this Court into granting further review. At oral argument before the court of appeals, Respondents challenged Petitioner's egregious attempt to repudiate her own underlying factual allegations, and the subsequent decision of the court of appeals implicitly rejected her transparent flip-flop on this point. Once again, however, before this Court, and in a poorly concealed attempt

to bootstrap her way to the "important question" she now poses for review, she brazenly contradicts the fundamental fact upon which her claims have always been based.

Petitioner labors very carefully to avoid the contradiction, never mentioning that her lawsuit has always been premised on her claim that she was discharged because she allegedly refused to perform acts that would have allegedly exposed her to criminal penalties for breach of her fiduciary duties. It is apparently her view that by blithely asserting now that she was ***not*** a plan fiduciary, and by thereafter positing that, as a result, she has no standing to enforce ERISA, she can then pursue her argument that, because she has no such standing, her claims cannot be preempted by ERISA. As stated above, Petitioner never raised the issues of whether she has standing to sue under ERISA and, if she does not, whether ERISA preemption can be a valid defense to her claims. Lest this Court be tempted to consider Petitioner's "important question" on the strength of her bare assertion that she had no standing under ERISA, however, a brief review of Petitioner's actual claims should be of assistance.

In her Original Petition, filed in April 1990, Petitioner's first cause of action alleged that, having "worked her way up to a top position [and] becoming the Administrator of the IBEW Trust Fund," her duties included the "administering of loans from [the Fund] to eligible borrowers, according to the rules and regulations governing the [Fund]." (Plaintiff's Original Petition) Petitioner further alleged that she subsequently determined that loans were being made under circumstances not contemplated by the Plan — which, according to her, made them unlawful — and that when she, as the person "in charge of administering" the Plan, allegedly refused to continue processing such loans, she was discharged. (*Id.*). Thus pled, Coker's allegations purported to state a Texas common law wrongful discharge claim under *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W. 2d 733 (Tex. 1985).

A *Sabine Pilot* claim requires that a plaintiff prove that she was discharged for refusing to perform an act for which she would have been exposed to criminal penalties. In response to interrogatories on that point propounded by Respondent IBEW Trust Fund, Petitioner identified Tex. Penal Code § 32.45, as the Texas criminal statute that she would have allegedly violated by processing the loans. The statute provides that

> (b) A person commits an offence if he intentionally, knowingly, or recklessly misapplies property ***he holds as a fiduciary*** . . . in a manner that involves substantial risk of loss to the owner of the property or to a person for whose benefit the property is held.

(Emphasis added).

In all subsequent amended petitions — including the Third Amended Original Petition, filed on September 27, 1993 (Tr. 910) and the "live" petition at the time of summary judgment — Petitioner continued to articulate her *Sabine Pilot* claim as one in which the Trustees' command that she process the loans in question "subjected [her] to criminal liability for misappropriation ***of fiduciary funds***. . . ." (Emphasis added).

Furthermore, in her First Supplemental Response to Certain Defendants' Motion for Summary Judgment, Petitioner again emphasized that, "under Vernon's Ann. P.C. Sec. 32.45, [she], ***as a fiduciary***, could be prosecuted for misapplication of ***fiduciary*** property." (Tr. Doc. 37) (emphasis added). Her response went on to point out that the Texas statute deals with misapplication of property held by anyone "***as a fiduciary***." (*Id.*). Finally, her Supplemental Response was supported by her personal affidavit, which contained the following:

> From July 1987 until April 18, 1989, the date of my termination, I functioned as the Administrator of the Pension Fund and Office Manager of the IBEW Pension Trust Office. My official job title was Administrative Agent. As such, ***I was a fiduciary with respect to the funds administered by my employer***. (emphasis added)
>
> . . .
>
> Therefore, if I participated in depletion of the funds by processing unemployment loans to employed members, ***as a fiduciary of the fund***, I would be subject to criminal liability for misappropriating the funds. (emphasis added)
>
> . . .
>
> The trustees refused to provide me with any instructions regarding how to handle the unemployment loan applications of employed applicants, ***thereby exposing me as a fiduciary to the risk of criminal liability for misappropriation of fiduciary funds*** if I participated in disbursing funds from the Plan to persons not entitled to receive the funds. (emphasis added)

(*See* Exhibit A to Tr. Doc. 37).

At no time in the trial court, or in her principal brief articulating her points of error in the court of appeals, did Petitioner argue that she was not a fiduciary under the Plan.

Indeed, her central cause of action has always been premised on the criminal liability to which she was allegedly exposed for improper conduct as a fiduciary — a point not lost on the court of appeals which, in its decision, obviously rejected Petitioner's attempt to repudiate her repeated assertions that she was a plan fiduciary. It is outrageous for her now to imply to this Court that her "non-fiduciary" status is an established fact in this litigation and to further contend, therefore, that the courts below erred in finding that ERISA preempted her claims despite her alleged lack of standing under ERISA. To the contrary, the only possible interpretations of the decisions below are that the Texas appellate courts determined, pursuant to Texas rules governing summary judgment, either that: (1) the evidence — including Petitioner's own admissions — sufficiently established that she was a plan fiduciary and her own factual allegations estopped her from now asserting the opposite; or that (2) she had waived any such argument by her failure to timely make it. In either case, no basis exists for Petitioner's implied premise before this Court that she was not a fiduciary, on which she then attempts to construct issues of "standing" and "prerequisites for preemption" that were never raised below.

Under these circumstances, it is, at best, ironic — and, at worst, grossly disingenuous — for Petitioner now to attempt to rely on decisions of the Ninth Circuit Court of Appeals for the proposition that standing to enforce ERISA is a prerequisite for ERISA preemption. Whether the Ninth Circuit is right or wrong on that point is an interesting, though wholly academic, question herein — in part because the issue was never raised or addressed below and, perhaps more significantly, because even the Ninth Circuit would undoubtedly endorse, rather than reverse, the previous appellate rulings in this case. After all, and as Petitioner well knows, the Ninth Circuit has held, on virtually identical facts, that plaintiffs such as Petitioner do indeed have standing to sue co-fiduciaries under ERISA §§ 502 and 510, 29 U.S.C. §§ 1132 and 1140.

In *Hashimoto v. Bank of Hawaii*, 999 F.2d 408 (9th Cir. 1993), the plaintiff was a former employee of the trustee of an ERISA profit-sharing plan who claimed, under Hawaiian law, that she had been wrongfully discharged in retaliation for resisting instructions from her employer to make certain allegedly illegal payments from the plan to certain participants. As have the Fifth and Sixth Circuit Courts in similar cases — *Anderson v. Electronic Data Systems Corp.*, 11 F.3d 1311 (5th Cir. 1994); *Authier v. Ginsberg*, 757 F.2d 796 (6th Cir. 1985) — the Ninth Circuit had no difficulty in finding Hashimoto's claim preempted by ERISA, and further held that ERISA's § 510, through the enforcement provisions available to plan fiduciaries under § 502, also empowered her to bring an ERISA enforcement action.

The ironic tautology is thus complete. First, Petitioner has never raised or argued the issue of whether she has standing to sue under ERISA — either as a fiduciary empowered to stop or prevent breaches of fiduciary duties under 29 U.S.C. § 1132(a)(2) or (3) or as an alleged victim of retaliation for opposing such breaches under 29 U.S.C. § 1140. Likewise, and not surprisingly, she has never previously raised or argued the issue of whether standing to sue under ERISA is a prerequisite for ERISA preemption. Nonetheless, she now points this Court to decisions of the Ninth Circuit that appear to require such standing before applying ERISA preemption, while simultaneously disregarding (or rejecting) authority from the same source indicating that she enjoys such standing. Should this Court grant her petition to answer Petitioner's "important question," it would be addressing a doubly-abstract issue — abstract because it has never been raised in, or considered by, the lower courts that have reviewed this matter, and because, regardless of how it might ultimately be answered, it will not alter the application of ERISA preemption to Petitioner's own claims.

CONCLUSION

This case presents no issue warranting review by this Court. Petitioner's attempted fabrication of such an issue purports to pose a question that was never presented to, or considered by, any of the courts below in this matter. Furthermore, Petitioner cannot direct this Court to any conflicting decisions by it, by any federal court of appeals, or by any state court of last resort on the issue she seeks to raise. In fact, Petitioner's "important question" — whether standing to sue under ERISA is a prerequisite to ERISA preemption — does not even constitute a genuine material issue in controversy, because the application of existing federal decisional law to the undisputed facts of this case indicates that Petitioner had standing to proceed under ERISA. Her Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 96-1143

In The

Supreme Court of the United States

October Term, 1996

LEAMINDA COKER,

Petitioner,

v.

JAMES P. DOUGLAS, A.A. COOK, RAY WILLIAMS, GEORGE E. SUMROW, CLIFFORD HENDERSON. CHARLES MELTON, Individually and as Trustees of the IBEW PENSION TRUST FUND LOCAL 716, and IBEW PENSION TRUST FUND LOCAL 716, and the INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 716,

Respondents.

On Petition For Writ Of Certiorari
To The Court Of Appeals
For The Fourth Judicial District
Bexar County, Texas

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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STATEMENT

Respondents argue that petitioner, ("Coker"), failed to raise her standing argument in the courts below, Brief in Opposition, (pp. 4-5). Such argument is unavailing as shown below. Respondents essentially argue that Coker cannot now challenge the federal court's subject matter jurisdiction over her claims. Such contention is contrary to [fundamental] established law.

Coker repeatedly argued in the trial court and on appeal that her claims were founded solely in state law *and were not the type of claims to which ERISA applied. See cf.* Rec. Vol. I, p. 3; and the appendix to Coker's petition. (Pet. App. 57a-59a [Remand Order of Federal Court; Pet. App. 23a-27a, 30a, 32a-39a]).

Respondents argued that Coker's claims came under federal court jurisdiction; therefore, respondents had the burden to establish such contention as a matter of law. Moreover, under Texas law, respondents, as movants for summary judgment on the affirmative defense of ERISA preemption, had the burden to establish every element of that affirmative defense as a matter of law. Thus respondents had the burden to demonstrate that the Act applied to Coker and her claims, [including § 1132 of the Act]. Absent such proof by respondents, petitioner, as nonmovant, had no burden to present evidence that her claims *were not* enforceable under ERISA, although she consistently maintained that ERISA was not applicable to her case. Respondents' Brief in Opposition consists substantially of complaints that petitioner failed to establish her *lack of standing* under ERISA in opposing dismissal of her claims. Coker's complaint, on its face, established that neither petitioner, nor her claims, fell within the

scope of § 1132; a federal judge concluded as much in remanding Coker's case to the State court after removal by respondents; *see* Remand Order. (Pet. App. 57a-59a). Significantly, the court of appeals, in its opinion, noted that *"[petitioner] made no claim under ERISA."* (Pet. App. 3a) [emphasis supplied].

Respondents incorrectly state in their Brief in Opposition, (p. 7, n. 4), that the facts of *Hashimoto v. Bank of Hawaii*, 999 F.2d 408 (9th Cir. 1993), are "materially indistinguishable from those in this case." Significantly, the plaintiff's claim in *Hashimoto* was actually recharacterized by the court as an ERISA claim under § 1140 of the Act; therefore, such contention by respondents is clearly incorrect on a controlling fact. Respondents continue to assert that petitioner's claims are within the scope of the Act, however, respondents have never demonstrated in what manner Coker, or her claims, come within § 1132 of the Act. Respondents, and the courts below, simply applied § 1144 (ERISA's preemption) clause in a vacuum, without addressing Coker's arguments that she had no claims enforceable under the Act (Pet. App. 6a-11a).

The cases relied upon by Coker, primarily *Curtis v. Nevada Bonding Corp.*, 53 F.3d 1023, 1026-1027, hold that standing to sue under ERISA is both a prerequisite to ERISA preemption and federal subject matter jurisdiction. The opinion of the Texas court of appeals to the contrary in this case conflicts with the Act, as well as with circuit precedent. The manner in which the state court has applied the Act to this case presents an important question of federal law which significantly impacts upon ERISA and raises significant issues relating to the power of a state court to "create" federal subject matter

jurisdiction by applying the Act's preemption clause without regard to the requirements of § 1132.

ARGUMENT

I.

RESPONDENTS' ARGUMENT THAT PETITIONER WAIVED THE RIGHT TO CHALLENGE FEDERAL COURT SUBJECT MATTER JURISDICTION IS CONTRARY TO ESTABLISHED LAW

Respondents claim that petitioner did not raise her standing argument in the courts below and therefore cannot do so at this time. The right to challenge the federal court's lack of subject matter jurisdiction in this case cannot be waived. *Elliott v. Tilton*, 62 F.3d 725, 727, n. 1. Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto. *Elliot* at p. 727, citing *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541. In addition, it is presumed that a cause lies outside the limited jurisdiction authorized by Constitution and statute "and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Elliot* at 727, [citations omitted]. The basis of federal court jurisdiction cannot be established "argumentatively or by mere inference," *Elliott* at p. 729. Moreover, the cases are legion holding that a party may not waive a defect in subject-matter jurisdiction, or

invoke federal jurisdiction simply by consent. *Pennsylvania v. Union Gas Company,* 491 U.S 1, 109 S.Ct. 2273, 2288 (1989); *citing, Owen Equipment & Erection Co. v. Kroger,* 437 U.S. 365, 377, n. 21, 98 S.Ct. 2396, 2404, n. 21 (1978); *Sosna v. Iowa,* 419 U.S. 393, 398, 95 S.Ct. 553, 556 (1975); *California v. La Rue,* 409 U.S. 109, 112, n. 3, 93 S.Ct. 390, 393, n. 3 (1972); *American Fire & Casualty Co. v. Finn,* 341 U.S. 6, 71 S.Ct. 534 (1951).

Moreover, "there is a strong presumption against federal preemption of state law and the burden of proof is on the party asserting such," *citing Silkwood v. Kerr McGee Corp.* 464 U.S. 238, 255, 104 S.Ct. 615, 625 (1984). Respondents failed to meet such burden of proof.

Standing is generally determined from the facts plead by the plaintiff. *See Gladstone Realtors v. Village of Bellwood,* 441 U.S. 91, 99 S.Ct. 1601, 1613 (1979), *citing Warth v. Seldin,* 422 U.S. 490, 501, 95 S.Ct. at 2206. Moreover, in *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58, 107 S.Ct. 1542 (1987) this Court holds that ERISA preemption can form the basis for removal jurisdiction notwithstanding the well pleaded complaint rule. (*See* arguments in Coker's Petition at p. 18). ERISA preemption was raised by respondents in the federal court removal proceedings, and was rejected by that court. (Pet. App. 60a-64a; *see* Remand Order, Pet. App. 57a-59a [where the court finds that Coker's "cause of action" does not arise under federal law and her claim "as a whole" is in essence one under state law]).

II.

IN ASSERTING THE AFFIRMATIVE DEFENSE OF ERISA PREEMPTION, RESPONDENTS HAD THE BURDEN TO ESTABLISH AS A MATTER OF LAW THAT THE STATUTE APPLIED TO PETITIONER'S CLAIMS

Despite respondents' contrary allegations in their Brief in Opposition, Coker filed a response opposing summary judgment in the trial court and argued that respondents' "preemption defense" was jurisdictional. (Rec. Vol. II, p. 454.) In briefs supporting their Motion for Summary Judgment, respondents argued that "ERISA's enforcement scheme provides causes of action analogous to the Plaintiff's claims, and Plaintiff's claims are impliedly preempted," *citing* this Court's decision in *Ingersoll Rand v. McClendon*, 498 U.S. 133, 111 S.Ct. 478 (1990). However, the plaintiff's claim in *Ingersoll Rand* was characterized by this Court as a claim for benefits under an ERISA plan. Thus, the plaintiff's claims in that case differed significantly from Coker's claim; moreover, in *Ingersoll Rand* the plaintiff qualified as a "participant" and a "beneficiary" within the scope of § 1132. Therefore, respondents statement that Coker's claims were "impliedly preempted" under this Court's decision in *Ingersoll Rand* is an obvious misapplication of that case.

Respondents do not dispute that Coker has never asserted a claim for benefits under the [ERISA] Plan. Respondents even argued to the trial court, [in requesting the state court to dismiss petitioner's case], that although ERISA permits state courts to exercise concurrent jurisdiction on a limited number of claims, [citing 29 U.S.C.

§ 1132 (e)(1); *i.e.*, claims for benefits under a Plan], petitioner's claims *did not* fall into [this category], and therefore [petitioner's claims] "lie in the exclusive jurisdiction of the federal court . . . " (Rec. Vol. II, p. 466). However, respondents did not attempt to demonstrate in what manner Coker's claims "lie in the exclusive jurisdiction of the federal courts," under § 1132.

Significantly, respondents conceded in their briefs to the trial court that a state law claim asserting that an employee, even an administrator, who was fired because of race, sex, age, etc., did not "relate to" a plan and therefore was not preempted. (Rec. Vol. IV, p. 1023), citing *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 97 n. 17 (1983) and *Lane v. Goren*, 743 F.2d 1337, 1339-40 (9th Cir. 1984). Thus, respondents legal analogies and arguments to the trial court were premised on an incorrect legal theory which was adopted by the trial court and the court of appeals, *e.g.*, that Coker's case was preempted by ERISA *solely* because her claims "related to" an ERISA plan, thereby triggering ERISA's preemption clause. The action of the courts below is contrary to Congressional mandate with respect to the parties entitled to bring an action under ERISA and the types of actions which may be asserted under the Act, as set forth in § 1132. The state courts in Coker's case in effect "created" federal subject matter jurisdiction over Cocker's claims *solely* by finding that her claims "relate to" an ERISA plan and came within the broad preemptive scope of § 1144 of ERISA. Thus, it is obvious from the record below that the courts analyzed the claims solely under § 1144 of the Act without regard to the status of Coker or her claims under § 1132.

To support respondents' incorrect legal theory, and resulting misapplication of § 1144 by the courts below,

respondents state in briefs to the trial court that they "have not contended that Plaintiff's breach of contract claim is preempted, precisely because it does not 'relate to' the Plan . . . ," (Rec. Vol. IV, p. 1024). Thus, respondents argued in the state courts that a case is preempted solely on the grounds that it meets the "relates to" test of § 1144. Despite Respondents' concession last above quoted, the trial court nonetheless dismissed all of Coker's claims on the grounds of complete ERISA preemption. (Pet. App. 14a-17a).

In opposing summary judgment, Coker argued that "[D]efendants continue to ignore and fail to address the controlling caselaw holding that a state court tort action brought against a pension plan . . . in its capacity as an employer is not preempted." (Rec. Vol. 4, p. 1032).

In Coker's Motion for New Trial in the trial court, she argued that "ERISA has no applicability to a suit against a pension plan as an employer in connection with matters concerning the relationship of employer and employee . . . ," and that summary judgment was improper in her case because her case *was not the type of case* "to which ERISA preemption applies." (Rec. Vol. I, p. 3). (Emphasis supplied). The record is replete with petitioner's arguments that her case is not the type of case contemplated in ERISA's regulatory scheme and therefore was not subject to preemption. Respondents' statements to this Court that petitioner is raising this issue for the first time are patently false.

Federal preemption is an affirmative defense. *See Gorman v. Life Ins. Co. of North America,* 811 S.W.2d 542, 546 (Tex. 1991), *cert. denied,* 502 U.S. 824, 112 S.Ct. 88

(1991) (preemption under Employee Retirement Income Security Act (ERISA)); *see also City of Houston v. First City,* 827 S.W.2d 462, 467-68 (Tex.App.– Houston [1st Dist.] 1992, writ denied) (preemption under federal banking laws pleaded as affirmative defense); *Dueringer v. General American Life Ins. Co.,* 842 F.2d 127, 129-30 (5th Cir. 1988) (ERISA preemption). When a defendant moves for summary judgment based on an affirmative defense, the defendant has the burden to prove conclusively all the elements of the affirmative defense as a matter of law. *Montgomery v. Kennedy,* 669 S.W.2d 309, 310-311 (Tex. 1984). Unless the movant conclusively establishes the affirmative defense, the non-movant has no burden in response to a defendant's motion for summary judgment filed on the basis of an affirmative defense. *Torres v. Western Casualty & Sur. Co.,* 457 S.W.2d 50, 52 (Tex. 1970).

Respondents' reliance on *Hashimoto v. Bank of Hawaii,* 999 F.2d 408 (9th Cir. 1993) is misplaced. The plaintiff in *Hashimoto* filed a claim which falls squarely within § 1132 of ERISA; moreover, the claim involved a state ["whistleblower"] statute which proscribed virtually identical conduct proscribed by § 1140 of ERISA. Standing under § 1132 was not an issue in *Hashimoto;* in fact, in that case, the Court held that "Hashimoto's complaint should be recharacterized as an ERISA claim under 29 U.S.C. § 1140." Moreover, the court in *Hashimoto* acknowledged that "[S]tate law can, however, apply to transactions between plans and . . . *their own employees, because these relationships are outside ERISA's purview,* citing *General Am. Life Ins. Co. v. Castonguay,* 984 F.2d 1518, 1522 (9th Cir. 1993). [emphasis supplied].

Coker's claims cannot be "recharacterized" as ERISA claims under any section of the Act. Under the Ninth

Circuit holdings in *Curtis v. Nevada Bonding Corporation*, 53 F.3d 1023 (9th Cir. 1995) and *Harris v. Provident Life and Accident Insurance Co.*, 26 F.3d 930 (9th Cir. 1994), Coker's case is not subject to preemption because her claims do not meet any criteria set forth in § 1132 of ERISA. Neither respondents, nor the courts below, attempted to recharacterize Coker's claims as claims that come within § 1132. Unless Coker and her claims come within the scope of § 1132, a preemption analysis has no applicability to her case.

Logically, if respondents could demonstrate that § 1132 of ERISA applies to Coker's claims, they certainly would have done so in order to establish that the Act applies to this case. In responding to Coker's analysis of § 1132's requirements in her Application for Writ of Error to the Texas Supreme Court, respondents simply ignored the issue and made no attempt to demonstrate how Coker and her claims came within that section of the Act.

The Courts below misapplied § 1144 of ERISA. Without standing to sue under § 1132, § 1144 is not applicable. The "relates to" analysis of the court of appeals in Coker's case ignores the requirements of § 1132 in finding preemption under § 1144 of ERISA. Respondents' failure to prove as a matter of law that Coker's claims were enforceable under § 1132 is fatal to their affirmative defense of ERISA preemption. Petitioner's complaint, on its face, established that her claims do not come within § 1132 of ERISA. Dismissal of Coker's case by the state courts constitutes a violation of her constitutional right to due process of law and equal access to the court. The holding of the court of appeals also violates the principles set forth in *Curtis v. Nevada Bonding, supra*, and in effect

"creates" federal subject matter jurisdiction where none exists.

CONCLUSION

The state courts' failure to correctly apply ERISA preemption to only those actions and persons specified in § 1132 demonstrates the need for plenary review of this case. It is likely that state courts have, and will, continue to find ERISA preemption of cases, [usually in the context of summary dismissal], without regard to the requirements of § 1132. Due to the ever expanding scope of § 1144 preemption, a real danger exists that the federal system will be needlessly burdened with cases such as Coker's.

The courts should be required to first focus on the requirements of § 1132 before applying ERISA's preemption clause. This case illustrates the need for guidance on this issue and thus presents an important question of federal law. This Court should provide such guidance in order to avoid the continued burden imposed on the federal system with claims which Congress never intended to include in ERISA's regulatory scheme.

Respectfully submitted,

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